THE DISTRIBUTION OF POWER TO REGULATE INTERSTATE CARRIERS BETWEEN THE NATION AND THE STATES

BY

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Affectionately Dedicated

TO THE MEMORY OF

MY FATHER

FRANK REYNOLDS

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PREFACE

In the study of transportation in the United States, economic and legal considerations are inextricably commingled. The economist and the lawyer are mutually dependent upon each other's services in their attempts to solve the problems which confront them in the transportation industry.

Transportation in most of its aspects is a highly regulated industry. The economist cannot analyze existing conditions in this industry nor venture predictions concerning its future without giving careful attention to the influences of state and federal regulation. In weighing the effects of regulation, he finds that its character and scope are determined, not only by legislative considerations of expediency, but also by legal restraints upon legislative power. The validity of regulatory legislation is decided by the courts. The history of the regulation of transportation cannot omit the prominent role played by the courts, and in attempting to improve existing conditions the attitude of the courts toward every proposed change in regulatory policy must be considered. Therefore, the economist must have some knowledge of the legal principles applicable to legislative power when he interprets the present status of the regulation of transportation and when he proposes changes therein. Furthermore, he is vitally interested in the transportation industry as a source of public revenues. From the standpoint of the amount of taxes paid by that industry, its property investment and its earning capacity, it occupies a very prominent place in the study of taxation. Here also attention must be given to legal considerations. Many taxes

levied upon transportation and its agencies have been declared by the courts to be invalid as exceeding the constitutional powers of the branch of government imposing the tax. Therefore, it is hazardous to analyze our present system of taxation or to propose changes therein without a very definite knowledge of the legal principles which determine the power of the taxing authorities.

On the other hand, the lawyer cannot hope to solve the legal problems concerning the powers of the state and federal governments to regulate or to tax the transportation industry without some knowledge of economic fact and theory. The decisions of the courts show a growing appreciation of the difficulty of deciding constitutional questions of legislative power solely upon the basis of abstract legal theory. The day is past in which the lawyer, preparing a brief on the validity of regulation or taxation, can safely confine his research to constitutions, statutes, court decisions and legal treatises. He must study and present to the court the economic facts upon which the demand for government action is based, and must attempt to analyze the economic consequences, favorable and unfavorable, which are likely to result therefrom.

This interdependence of law and economics is particularly apparent in studying the distribution between the state and the federal governments of the power to regulate or affect carriers engaged in interstate transportation. The way in which this power has been distributed by the United States Constitution, federal statutes, and judicial interpretation thereof, has largely determined the character of the regulation and taxation of such carriers. The economic consequences are vital. This may be shown by two important illustrations. At the close of the World War there was a grave question whether efficient interstate railroad transportation could be furnished under private management. The

railroad facilities were not physically adequate to provide prompt transportation for the volume of traffic that was offered, and the ability of the railroads to finance the enlargement of these facilities was seriously impaired by their failure to earn a return upon their investment sufficient to attract capital. At this juncture federal power was exercised to increase, not only the revenue derived from interstate transportation, but also that derived from traffic which did not cross state lines. This immediately raised the legal question of federal power thus to regulate intrastate transactions. If the United States Supreme Court had not sustained this exercise of federal power, it is very doubtful whether the railroads could have rehabilitated their financial position as they have done during the past seven years. A continuation of impaired credit and inadequate service would probably have aroused an acute agitation for government ownership and operation of interstate railroads. The other illustration is taken from the field of taxation. The argument was made that state taxation of property used in interstate transportation and of the net earnings derived from such transportation is illegal because it imposes a burden upon interstate commerce. If this argument had been sustained by the Court, the states and the various subdivisions thereof would have been deprived of a source of revenue from which they now derive a quarter of a billion dollars annually. The exemption of interstate railroad property and income from state taxing power would have had almost revolutionary effects upon our system of public finance. On the other hand, the distribution of power has to a large extent been determined by economic considerations. The same two illustrations may be used to show that this is true. Federal power to regulate the general level of intrastate rates was exercised and sustained largely because of the economic fact that an additional dollar earned from intra-

state traffic has just as much effect upon the credit of a railroad and its capacity to provide transportation facilities as an additional dollar earned from interstate traffic. The decisions sustaining state power to tax property used in interstate transportation and the net earnings derived therefrom were largely influenced by the Court's belief that, as a matter of economic fact, no serious impediment or restraint was imposed upon interstate commerce by compelling the industry of interstate transportation to contribute on equal terms with other taxpayers to the expenses of administering state governments.

The purpose of this discussion is to show how the control of carriers engaged in interstate transportation is divided between the state and the federal governments and to trace the process of judicial interpretation and legislative activity by which the present distribution of powers has gradually evolved from the provisions of the United States Constitution. In attempting to accomplish this purpose it is necessary to give a detailed analysis of many decisions of the United States Supreme Court because it is impossible to interpret the history of the distribution of powers or to make definite statements concerning the existing status without some knowledge and appreciation of technical distinctions made by the Court. The legal material here presented has, however, a direct bearing upon the work of the economist. It forms an important part of the history of transportation in the United States because the character of our past and present plans of regulation and taxation of interstate carriers has been largely determined by constitutional considerations. Furthermore, the economist is vitally concerned with the relation of state and federal powers in all his efforts to improve our transportation system. If he suggests legislative remedies, he must either coordinate his proposals with the present division of control between the states and the

nation or must embody in his legislative program measures to readjust the distribution of power within constitutional limits. Therefore, it is hoped that students of the economics of transportation will find some value in this statement and explanation of the legal foundation upon which our system of control of interstate carriers is based, and in the suggestion of many points of contact between the law and the economics of transportation.

Grateful acknowledgment must be made to Professor Thomas Reed Powell for suggesting the basis of much of the analysis of constitutional interpretation presented in this volume. When Professor Powell was a member of the Faculty of Political Science at Columbia University, I had the privilege of attending his lectures on Constitutional Law. The preparation of this study was commenced almost immediately thereafter, and these lectures provided an invaluable foundation for my approach to the many decisions herein discussed. I am deeply indebted to my teacher and friend, Professor Edwin R. A. Seligman, for his interest and helpful advice as the work progressed. I wish especially to thank Professor Noel T. Dowling and Dr. Robert L. Hale, both of whom read my manuscript with great care. Their criticism has enabled me, not only to eliminate many errors, but also to clarify and strengthen parts of the discussion which were far from satisfactory as originally written. To many others, whose work has been of great assistance to me and whose ideas are embodied in this volume, I have endeavored to make appropriate acknowledgment in the text.

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INTRODUCTION

It is a matter of economic necessity, too obvious for elaborate discussion, that the transportation of freight and passengers between points in the same state and between points in different states must be accomplished to a very large extent by physical agencies and instrumentalities used in common for interstate and intrastate transportation, such as tracks, public highways, motive power, vehicles, stations and terminals. These agencies of transportation and their owners, in the pursuit of their public calling, must be subject to the exercise of governmental powers arising from some source, either state or federal. Some jurisdiction must determine the extent, if any, to which they shall be subject to taxation, their rates, fares, service and business practices shall be regulated, and the public safety, health and welfare shall be protected from impairment by their activities.

In the distribution of the exercise of power between the states and the nation there are three possible solutions from a purely academic standpoint:

1. Exclusive exercise of power over interstate carriers by the states.
2. Exclusive exercise of such power by the nation.
3. A division of its exercise between the states and the nation.

From the practical, as distinguished from the academic, standpoint, the first of these solutions must be summarily rejected. Not only is it contrary to the specific grant of power to regulate commerce conferred upon the federal gov-

ernment by the Constitution, but it is also in direct opposition to the universal recognition of the need of national solutions of national problems.

The second suggested solution, exclusive exercise of federal power, must also be rejected from the practical standpoint as impossible of present realization. While recent decisions of the United States Supreme Court support a very comprehensive exercise of federal power over interstate carriers, they nevertheless recognize that there are constitutional limits to congressional action. Furthermore, we are now experiencing a reaction from extreme centralization of power in the federal government, and the sentiment for state regulation of local affairs is so strong that it is entirely improbable that Congress would attempt to exercise exclusive jurisdiction even if it could constitutionally do so.

Thus, by a process of exclusion, it appears that for some time to come there must be a division of sovereignty in the various measures affecting interstate carriers. Owing to the inextricable interblending of local and national interests in the affairs of such carriers, it is utterly impossible to draw a clean-cut line between the proper fields of state and federal control. Attempts can be made to frame abstract formulæ for such purposes, but an abstract formula is at best a feeble attempt to give expression to ideas which cannot be defined with accuracy by the use of any language. Such formulæ are not only subject to the rule of reason and common sense, which frequently dictates that exceptions must be made to their terms, but they also give rise to disagreement as to their interpretation. It is, therefore, inevitable that, conceding the necessity for division of sovereignty, conflict must arise in determining the line of division.

The Supreme Court of the United States in interpreting the Constitution has divided the field of exercise of the powers of government into three zones:

1. The zone in which federal power is exclusive.
2. The zone in which federal and state powers are concurrent.[1]
3. The zone in which state power is exclusive.

The determination of the boundaries of these zones is a judicial problem for the solution of which we must look to the Supreme Court of the United States as the ultimate arbiter of all such questions arising under the Constitution of the United States. In deciding whether a proposed exercise of power over interstate carriers should proceed from the federal government or the states, it must first be determined in which of these three zones the power will be exercised. If it relates to a subject which falls within either the first or third zone, there is no room for the exercise of legislative discretion in the division of sovereignty; if in the first zone, the federal government only can exercise power, and if in the third zone, the power must be exercised, if at all, by the states. When, however, the proposed exercise of power relates to a subject within the zone of concurrent jurisdiction, the division of sovereignty becomes a matter of legislative discretion. This discretion rests with Congress, because the Constitution established the supremacy of congressional action within the scope of congressional power. Within the limits of the second zone, Congress by its action may restrict the exercise of the sovereignty of the states. The courts, of course, will in particular cases determine the extent to which congressional action has so limited state power in this second zone, but such determination

[1] "Concurrent" is used throughout to denote the co-existence of paramount federal and subordinate state power, the sense in which it is customarily used in discussing the power to regulate commerce. The word "concurrent" did not appear in the United States Constitution until the adoption of the Eighteenth Amendment where it has been interpreted to indicate coordinate state and federal powers. See *United States* v. *Lanza* (1922), 260 U. S. 377.

merely seeks to interpret the will of Congress, which may be changed or differently defined by subsequent acts of Congress. The division of sovereignty within the zone of concurrent jurisdiction is, therefore, a legislative problem in which the role of the courts is confined to the interpretation of legislation.

Thus the conflict of state and federal sovereignty involves both judicial and legislative problems. The Supreme Court of the United States must determine the extent of the powers granted to the federal government and left with the states by the United States Constitution. In the zone in which state and federal powers, as so determined, overlap, Congress must decide as a matter of legislative policy the extent to which it will assert its constitutional supremacy over state action. It is significant that the final determination of the dividing line between state and federal action rests in all cases with some branch of the federal government; when this dividing line is drawn by constitutional interpretation, the ultimate authority is the Supreme Court of the United States; when it is drawn by the exercise of federal power, the ultimate authority is the Congress of the United States.

As the result of United States Supreme Court decisions and congressional legislation the sphere of federal regulation of interstate carriers has been gradually broadened and the authority of the states has been correspondingly narrowed. There is a widespread belief, particularly among state officials charged with the duty of regulating railroads, that this process has gone too far and, if unchecked, will result in a dangerous centralization of powers in the hands of federal authorities. This discussion will survey the various judicial decisions and acts of Congress whereby the line of separation between state and federal action has been drawn and, in conclusion, will outline the present situation, and the pending proposals for changes.

The judicial aspects of the problem will be considered first. The federal government being one of enumerated powers, it is necessary to know the extent of those powers and the extent to which their existence excludes the exercise of similar powers by the states. For this purpose attention must be given to the grant of federal powers made by the adoption of the United States Constitution, the circumstances surrounding that grant, and its interpretation by the Supreme Court of the United States. From these sources an attempt will be made to show the recognized limits of state and federal power over interstate carriers. As already indicated, it will be seen that the fields embraced within these limits overlap.

This leads to the consideration of the exercise of federal power within the field of concurrent state and federal jurisdiction. The various acts of Congress exercising federal authority will be examined with a view to showing the curtailment of state authority resulting therefrom. Various Supreme Court decisions interpreting the will of Congress as expressed in such acts will be reviewed at this point, as such decisions help to answer the legislative question "What has Congress done?" rather than the judicial question "What can Congress do?"

The survey of court decisions and congressional action will give the basis for an outline of the present status of the separation of state and federal powers with respect to interstate carriers in the light of the criticism now being offered. On the one hand, it is strongly urged that the interests of the nation demand the widest scope of federal authority; on the other hand, state authorities are making vigorous efforts to regain a greater measure of state autonomy. The arguments for and against pending proposals for change will be presented and considered. The writer's purpose is rather to promote a clear understanding of the issues involved, than

to advocate either side of the controversy. He will, however, make no attempt to conceal his belief that the problem of the regulation of carriers engaged in interstate transportation is national, not local, requiring in its more important aspects a uniform system of regulation controlled by a single authority, the federal government.

Repeated mention has already been made of the limits of state and federal powers imposed by the United States Constitution. The scope of this discussion is meant to include only limitations upon state and federal power arising from the division of powers between the states and the federal government. Both state and federal powers are also limited by safeguards to life, liberty and property imposed by amendments to the Constitution. Neither the states nor the federal government in the exercise of their powers may deprive any person of life, liberty or property without due process of law. The states may not abridge the privileges or immunities of citizens of the United States nor deny to any person within their respective jurisdictions the equal protection of the laws. In their practical application these provisions have resulted in a distinct curtailment of both state and federal authority in the regulation of interstate carriers, particularly in the regulation of rates and service. They do not, however, concern the division of state and federal authority and, therefore, are not relevant to the problems here presented.

CHAPTER I

THE CONSTITUTIONAL GRANT OF FEDERAL POWER

THE federal powers of the United States, as existing prior to the adoption of our present Constitution, were defined by the Articles of Confederation. This document, prepared by a committee of the Continental Congress and ratified by the thirteen original states while the Revolutionary War was still in progress, was far from generous in its grant of commercial powers to Congress. Article IX of the Articles of Confederation, which contains the complete enumeration of powers conferred upon the United States, includes only six powers, which are at all closely related to commerce. These are:

1. Entering into treaties and alliances.
2. Regulating the alloy and value of coin.
3. Fixing the standard of weights and measures.
4. Regulating the trade and managing all affairs with the Indians.
5. Establishing and regulating post-offices from one state to another.
6. Borrowing money and emitting bills on the credit of the United States.

The treaty-making power in its relation to commerce was severely restricted. In the words of Article IX: "No treaty of commerce shall be made whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation

or importation of any species of goods or commodities whatsoever." This appears to imply that Congress could make treaties of commerce guaranteeing to foreigners freedom from discrimination in the imposition of imposts and duties by the states, but such guarantees would have been of little value in view of the specific reservation to the states of power to prohibit exportation or importation.

Among the powers affecting commerce, conspicuous by their absence, are those of taxation and of regulating trade and transportation between the states and with foreign nations in matters not falling within the powers specifically enumerated above. Thus Congress could regulate transportation only by means of commercial treaties with foreign nations and such regulation was subject to the restrictions of Article IX already quoted. So far as transportation between the states is concerned, no power whatever was granted to Congress by the Articles of Confederation. Taxation was left entirely to the several states, the states merely pledging themselves to supply a common treasury, in proportion to the value of all land within each state, with the funds necessary to defray Congressional appropriations.[1]

Nor were the powers of Congress under the Confederation capable of extension under any doctrine of implied powers such as developed in the interpretation of the United States Constitution. Article II of the Articles of Confederation thus makes any such extension impossible: "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation *expressly* delegated to the United States in Congress assembled." [2]

Under the reservation just quoted the power which each

[1] Article viii.

[2] Italics mine.

state could exercise within its own territory over foreign and interstate commerce was very broad, but not entirely unrestricted. The following brief summary of the restrictions on such power will, however, show that they were relatively unimportant. The states could not deny privileges to or impose restrictions upon free inhabitants of other states which were not denied to or imposed upon their own inhabitants.[1] They could not lay any imposition, duties or restrictions on the property of the United States or either of them.[2] They could not lay imposts or duties interfering with stipulations in treaties made in pursuance of any treaties *already proposed* by Congress to the courts of France and Spain.[3] They could not make treaties, as the sole and exclusive treaty-making power was granted to Congress by Article IX. They could not impose discriminatory imposts and duties against foreigners protected against such discrimination by treaty provisions.[4]

With respect to interstate and foreign commerce, therefore, the power of each state to impose duties, regulations and restrictions of a non-discriminatory character was practically unlimited. For example, if a state desired to protect its own industries, it could and did impose a protective tariff against commodities coming from other states or from foreign nations.

To summarize the distribution of commercial powers under the Articles of Confederation, each state, subject to relatively unimportant exceptions had full power to impose taxes, duties, burdens and restrictions on commerce, not only between points within its own borders, but with other states

[1] Article ii.

[2] *Ibid.*

[3] Article vi. Italics mine.

[4] Article ix.

and foreign nations, so long as its action did not discriminate in favor of its own inhabitants, while the United States had no substantial authority except as incidental to the treaty-making power, and even this was narrowly limited in its operation upon commerce. The professed objects of the Confederation, the common defense of the states, the security of their liberties, and their mutual and general welfare, were not attained. The absence of federal commercial power contributed in a large measure to this failure. In interpreting its collapse, it is possible to overemphasize the deficiencies of powers granted to the Confederation. It must be remembered that the United States of America as defined by the Articles of Confederation were not a nation but a "Confederacy", or "league of friendship". The central organization thereby created possessed the mandate, not of the people, but of the states. Its actions were determined by the delegates to Congress voting by states, each state having one vote.[1] Under such an organization, it could scarcely be expected that the national point of view would develop. An appreciation of national, as distinguished from local, interests is essential to give force and vitality to such a union. It is improbable that a mere league, in no true sense a nation, could have faced and solved the postrevolutionary problems, even if its grant of powers had been far more extensive.

It is, however, equally improbable that a government organized according to the plan of the United States Constitution, deriving its mandate directly from the people and giving direct representation to the people, could have survived the difficulties that beset the Confederation if its powers had been limited to those granted by the Articles of Confederation. Any central authority, whether a league or a national government, would have found itself helpless without the

[1] Article v.

power to regulate trade and transportation between the states and with foreign nations, to levy taxes and duties on foreign commerce, and at times even to prohibit exportation and importation. The principal difficulties and dangers arising from this defect of power as actually developed in the years following the Revolution were these:

1. Inability to negotiate commercial treaties with foreign nations.
2. Hostility between the states due to burdensome state commercial regulations.
3. Inability to raise revenues to meet the expenses and pay the debts of the Confederation.

American industrial and commercial interests suffered severely in the years immediately following the Revolution because it was found impossible to negotiate satisfactory commercial treaties. This is forcibly illustrated by the commercial relations of the United States with Great Britain. Under an Act of Parliament, the trade between the United States and Great Britain and her possessions after the Revolutionary War was subject to regulation by the Crown through Orders in Council. Several such Orders were issued in 1783 which, while mitigating to some extent the severity of the British navigation acts, imposed restrictions extremely injurious to American shipping and commerce.[1] The most severe restrictions related to trade with the British West Indies which was required to be carried in British-built vessels owned and navigated by British subjects, and was limited to certain specified commodities. The power of persuasion alone was insufficient to induce the British Government to moderate these restrictions. The doctrines of Adam Smith, expressed in *The Wealth of*

[1] Acts of the Privy Council of England, *Colonial Series* (ed. by James Monro, London, 1912), vol. v, pp. 527-531.

Nations, had not yet become the commercial policy of Great Britain, and the mercantilist policy of building up British shipping and British trade at the expense of the shipping and trade of commercial rivals still prevailed. It is probable that Great Britain would have yielded the commercial advantages she had thus seized, either for reciprocal commercial privileges or to avoid retaliatory measures. Just at this point the absence of commercial power tied the hands of Congress and its representatives. Commercial privileges to British subjects could not be included in a treaty because the treaty-making power was subject to a specific proviso against treaty provisions restraining the legislative power of the states and no assurance could be given Great Britain that any state would not exercise its reserved right of imposing imposts and duties and of "prohibiting the exportation or importation of any species of goods or commodities whatsoever".[1] Threat of retaliatory measures was equally impossible because Congress had no power whatsoever to enact navigation acts directed against British shipping, to impose duties on British commodities, to prohibit exportation or importation to or from British territory, or to impose any burden or restriction whatsoever on trade with Great Britain. Attempts were made by Congress to obtain power to regulate foreign trade, but failed owing to intersectional jealousy. The result was that John Adams, sent to the British court to secure the relaxation of British restrictions on American shipping, was powerless to accomplish his mission, and that Jefferson's commercial negotiations with the French government were equally unsuccessful.

The peace and welfare of the states was also seriously threatened by the restrictions and burdens imposed by the states on interstate and foreign commerce. Congress was without power to protect such commerce against intemperate

[1] Articles of Confederation, ix.

and ill-considered state action. These state-imposed restrictions and burdens had three widely different purposes in view: retaliation against British restrictions on American shipping, acquisition of revenue for the state treasuries, and protection of domestic trade and industry.[1] They took various forms such as acts virtually closing ports to British shipping, tonnage acts, duties on goods from foreign countries even when destined to other states, and finally duties on goods entering the state from other states.[2] Restrictions imposed by one state, when bearing too heavily upon the inhabitants of another state, led to reprisals, and this restraint of trade was not only exceedingly damaging to business prosperity, but also was productive of dangerous animosities between the members of a confederation professedly formed as a firm league of friendship.[3] New York, which had the advantage of controlling the port of entry for commodities widely used in other states, was one of the states which laid imposts on imports both for revenue and protection, the proceeds of which went into its own treasury regardless of the ultimate destination of the goods.[4] Nor did New York confine its commercial duties to imports from foreign countries. With a view to protection of its own trade and industry it imposed protective duties against the products of neighboring states. John Fiske thus describes the situation in 1787:

The City of New York, with its population of 30,000 souls,

[1] Brown, D. W., *The Commercial Power of Congress in the Light of its Origin* (New York, 1910), p. 15; Johnson, E. R., *History of Domestic and Foreign Commerce of the United States* (Carnegie Institution of Washington, 1915), pp. 135-140.

[2] Johnson, *op. cit.*, pp. 135-140; Brown, *op. cit.*, pp. 14, 15, 19, 20, 21.

[3] Johnson, *op. cit.*, p. 138.

[4] For a summary of state tariff legislation, 1775-1789, see William Hill, "The First Stages of the Tariff Policy of the United States", *Publications of the American Economic Association*, vol. viii (1893), no. 6, pp. 38-55.

had long been supplied with firewood from Connecticut, and with butter and cheese, chickens and garden vegetables, from the thrifty farms of New Jersey. This trade, it was observed, carried thousands of dollars out of the city and into the pockets of detested Yankees and despised Jerseymen. It was ruinous to domestic industry, said the men of New York. It must be stopped by those effective remedies of the Sangrado school of economic doctors, a navigation act and a protective tariff. Acts were accordingly passed, obliging every Yankee sloop which came down through Hell Gate, and every Jersey market boat which was rowed across from Paulus Hook to Cortlandt Street, to pay entrance fees and obtain clearances at the custom house, just as was done by ships from London or Hamburg; and not a cart-load of Connecticut firewood could be delivered at the back door of a country-house in Beekman Street until it should have paid a heavy duty. Great and just was the wrath of the farmers and lumbermen.[1]

Both Connecticut and New Jersey promptly retaliated. Perhaps this is an extreme instance, but it shows the extent to which state power unrestrained by federal power could burden the simplest interstate transactions. New York, however, did not stand alone in following a selfish commercial policy. Numerous and complicated laws were adopted by other states which imposed tariffs, and otherwise acted in restraint of trade; retaliatory legislation followed in states oppressed by such laws. In short, the Confederation was drifting into a situation of commercial warfare for which its Congress could provide no remedy without power to regulate interstate and foreign commerce.

The defects of power already pointed out relate to the direct regulation of commerce as such for commercial purposes. Another defect of congressional power under the Confederation was the inability of Congress to raise revenue,

[1] Fiske, John, *The Critical Period of American History* (Boston, 1896), p. 146.

and in particular the absence of power to lay imposts and duties on commerce. The system of raising revenue by requisitions on the states intended to meet the current expenses of the government, was not a success owing to the delinquency of the states in meeting their quotas. It was, therefore, imperative to find other methods of providing funds. Congress, in its financial straits, turned its attention to commerce as a source of revenue, and in 1781 requested permission to lay a duty of five per cent on imports, but the refusal of Rhode Island defeated this plan.[1] After 1783 some revenue was derived from the sale of lands in the public domain which, however, was intended to be applied to payment of the principal of the public debt.[2] Aside from the public lands, Congress found itself practically without resources. The plan of obtaining funds through a duty on imports was again brought forward in the form of a proposed amendment to the Articles of Confederation granting to Congress the power of levying and collecting customs duties. Unanimous consent of the states was necessary for the adoption of amendments to the Articles of Confederation. Twelve states approved the amendment, but it was finally rejected by New York in February, 1787.[3] The failure of this amendment precipitated the crisis that led to the adoption of the United States Constitution. The Confederation could not obtain the necessary funds to pay its expenses; this was in a large measure due to lack of power to tax commerce; that power, when sought as an obvious remedy for the deficiency of funds, was denied. In interpreting the downfall of the Confederation, very strong emphasis must be placed upon this factor.

[1] Dewey, D. R., *Financial History of the United States* (8th ed., New York, 1922), p. 50.

[2] Fiske, *op. cit.*, p. 218.

[3] Fiske, *op. cit.*, p. 220.

This brief review of the relations of government and commerce during the Confederation will help to explain the objects in view in framing the commerce clauses of the United States Constitution. When the Constitutional Convention met at Philadelphia in the summer of 1787, its delegates faced a grave political crisis arising from the failure of the Confederation to attain the objects for which it was formed. It had failed to present a united front to foreign nations in protecting the commercial interests of the states, largely because the states and not Congress possessed the power of regulating foreign commerce. It had failed to preserve friendship and harmony among the several states, largely because Congress was powerless to restrain the states from imposing complex and vexatious burdens on interstate and foreign commerce. It had failed to raise revenue sufficient for an efficient exercise of the limited powers it possessed because the sole power to tax commerce was jealously retained by the states.

In addition to these evils directly attributable to the absence of federal commercial power, the general state of mind of the delegates to the Convention must be considered to understand the purpose of the commercial clauses of the Constitution. In 1787 there was a widespread fear of anarchy and of the collapse of governmental protection to property interests. Finance, public and private, was in hopeless confusion. The public debt was not being paid and revenues were insufficient to meet the necessary expenses of government; hence a craze for inconvertible paper money prevailed in several of the states.[1] To this financial chaos

[1] Bancroft, George, *History of the Formation of the Constitution of the United States of America* (3rd ed., New York, 1883), vol. i, pp. 228-241, gives an account of the proposals in each state for the emission of paper currency which shows that in the years 1785 and 1786 paper currency was issued in Rhode Island, New York, New Jersey, Pennsylvania, North Carolina, South Carolina and Georgia, and that proposals for such emission were introduced but defeated in Massachusetts, Maryland and Virginia.

was added the panic caused by Shay's rebellion in Massachusetts in January and February. David Walter Brown, in an interpretation of the commercial power of Congress based upon a study of documents contemporary to the adoption of the Constitution, presents abundant evidence of the prevalent fear of anarchy and outlines its influence upon the framers of the Constitution as follows:

> . . . The terms in which the instrument was expressed and the ends sought to be attained through it, resulted from a much deeper motive than the desire to improve the regulation of commerce—from the conviction of a governmental and social aristocracy, alarmed over the threatened breakdown of government and order in America, that a strong central authority was indispensable to the maintenance of order and civil peace, and to the protection of rights of property against the assaults of the multitude. In its origin, the Constitution of the United States is not a trade convention; it is the framework of a national government with strong coercive powers, formulated by the political, social, and financial leaders of the time, under the influence of great fear, for the purpose of protecting themselves and their property. This determination of the dominant party in the Convention drew into its design all incidental powers bestowed upon the new government; and a correct view of the scope which the members intended to give to the several powers, including that over commerce, cannot be obtained without recognition of this dominant purpose. . . .[1]

Thus we have a situation in which a body of men, of great political genius and conservative in character, assembled with a deep conviction that a strong central government with

[1] Brown, D. W., *The Commercial Power of Congress Considered in the Light of its Origin* (New York, 1910), introduction, pp. vii, viii. This book lays especial stress upon fear of anarchy as a dominant motive in the entire work of the Constitutional Convention. Chapters vi and vii give detailed contemporary evidence in support of an interpretation of the powers granted by the Constitution in the light of this motive.

broad and comprehensive powers was essential to the protection of their lives and property. They had just experienced the disastrous consequences of withholding the power to regulate and tax commerce from the Congress of the Confederation. To any such body the transfer of a large measure of commercial authority from the states to the federal government must have appeared imperative. In this readjustment of commercial powers the experience and environment of the members of the Convention would suggest the following essential points:

1. Federal power of taxation, including the power to tax commerce.
2. Federal power to regulate interstate and foreign commerce.
3. Adequate federal authority to insure the efficient execution of federal powers.
4. Restriction of state power to burden interstate and foreign commerce.
5. Supremacy of federal over state powers.

These five points are all embodied in the Constitution framed by the delegates to this convention and subsequently ratified by all the states. The first three are covered by the grant of powers to Congress enumerated in Article I, Section 8:

The Congress shall have Power [1.] To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; . . .

[3.] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . And

[18.] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Upon the general tax and commerce powers thus granted to Congress some restrictions are made by Section 9 of Article I, which excludes from the grant the power to prohibit the slave trade prior to 1808, to levy direct taxes unless in proportion to population, to tax exports, to discriminate between the ports of different states and to require vessels to enter, clear or pay duties on interstate voyages. These are the only express limitations imposed by the Constitution as originally adopted upon the federal tax and commerce powers.

The fourth point, the restriction of state commercial powers, is implied in the grant of paramount federal powers and is also made the subject of express provisions in Article I, Section 10. Among the various restraints on state powers enumerated in that section, the following particularly apply to the regulation of commerce:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.
>
> No state shall, without the consent of Congress, lay any Duty of Tonnage . . . [or] enter into any Agreement or Compact with another State. . . .

The last point, the supremacy of national powers over state powers, is protected by the following part of Article VI:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The subject of this discussion, the regulation of interstate carriers, is primarily a problem arising under the commerce power. It is, however, already apparent that the commerce power and the taxing power are so closely related that the latter must be included in a consideration of the regulation of commerce from the standpoint of the effect of legislation upon commerce. For example, a duty on imports is in fact a regulation of commerce, whether imposed to produce revenue as an exercise of the taxing power or to diminish importation as an exercise of the commerce power. The fiscal and commercial aspects of the control of commerce cannot be separated. For fiscal reasons a state might desire to impose a duty upon interstate trade; for commercial reasons the nation might desire to remove that duty. Therefore, the Convention's general plan for the control of commerce included grants and restrictions of both commercial and taxing powers. All the constitutional provisions of this character must be considered together to understand how the Constitution defines the control of commerce.

The framers of the Constitution could have had no conception of the great variety of legislation affecting commerce which would arise under these clauses. They clearly intended that Congress should have certain specific and well-understood commercial powers, the absence of which under the Confederation contributed to the political crisis of 1787. These included the power to:

1. Pass navigation acts and tonnage acts.
2. Prohibit exports to and imports from foreign countries.
3. Collect duties on imports from foreign countries.
4. Protect both foreign and interstate commerce from interference by state-imposed duties.

It does not, however, follow that the grant of commercial

power to the federal government was intended to be limited to the forms of regulation for which federal authority was urgently needed at that time. The form and language of the Constitution itself and the circumstances surrounding its adoption fail to support so limited an interpretation of federal commercial powers.

If the Convention had intended thus to restrict federal authority over commerce, it would scarcely have used such a general term as "power to regulate commerce"; instead it would have enumerated the specific commercial powers to be exercised by Congress. The forms of regulation for which immediate need was felt were not so numerous as to have made such enumeration cumbersome or impracticable, and could have been included in the detailed enumeration of powers contained in Article I, Section 8 of the Constitution. The provisions of Sections 8, 9 and 10 of Article I show that the framers of the Constitution took great care to specify the limits placed upon federal and state powers. In these sections are found several restrictions upon federal and state action affecting commerce. They contain, however, absolutely no indication of any attempt to limit the federal commercial power to a few specific forms of regulation. The internal evidence derived from the Constitution itself, therefore, is inconsistent with an intention that the power of Congress to regulate commerce should include only the particular kinds of regulation for which federal control was then desired.

The absence of a definite intention so to restrict federal commercial power is further confirmed by the fact that the dominant motive of the convention was the desire to create a strong federal government clothed with sufficient power to prevent the recurrence of such a crisis. The delegates were in a state of mind bordering on panic as a result of the political and financial chaos which seemed to them to con-

stitute an imminent menace to their property, their welfare and even their lives. They attributed this chaos to lack of adequate federal authority. They must avoid the fundamental errors of the Articles of Confederation and establish a truly national government, to which there should be granted powers, not narrowly circumscribed as were those of the Congress of the Confederation, but broad enough to meet both present and future needs. It was in this spirit that the delegates undertook their work, and that we must interpret their efforts to cure what they considered to be the most glaring defects of federal authority.[1] That the absence of adequate power to regulate commerce was so considered is beyond dispute. Hamilton says that the importance of the Union in a commercial light is

> one of those points about which there is the least room to entertain a difference of opinion, and which has, in fact, commanded the most general assent of men who have any acquaintance with the subject.[2]

In another paper by Hamilton we find the following:

> In addition to the defects already enumerated in the existing federal system, there are others of not less importance, which concur in rendering it altogether unfit for the administration of the affairs of the Union.
>
> The want of a power to regulate commerce is by all parties allowed to be of the number . . . There is no object, either as it respects the interests of trade or finance, that more strongly demands a federal superintendence. The want of it has already operated as a bar to the formation of beneficial treaties with foreign powers, and has given occasions of dissatisfaction between the States.[3]

[1] See *supra*, pp. 36, 37, and Brown, D. W., *The Commercial Power of Congress Considered in the Light of its Origin* (New York, 1910), chapters vi, vii.

[2] 11 *Federalist*.

[3] 22 *Federalist*.

Madison also indicates the importance attached to the commerce power by saying:

> The defect of power in the existing Confederacy to regulate the commerce between its several members, is in the number of those which have been clearly pointed out by experience. To the proofs and remarks which former papers have brought into view on this subject, it may be added that without this supplemental provision [the power to regulate interstate commerce], the great and essential power of regulating foreign commerce would have been incomplete and ineffectual.[1]

The framers of the Constitution, thus impressed with the importance of the commerce power and with the dangers arising from a narrow restriction of federal authority, in all probability had no intention of limiting the "power to regulate commerce" to those specific forms of regulation for which a single, uniform control was then urgently needed, and of thus depriving the federal government of authority to devise and enforce such other forms of regulation as future necessity might require. To place such narrow limits on federal commercial powers would have been entirely inconsistent with the dominant purpose of creating a strong government.

We must, however, distinguish between the absence of an intention to restrict general terms such as the "power to regulate commerce with foreign nations and among the several states" to specific forms of regulation, and the presence of an intention to include within these terms every conceivable action affecting such commerce. While the purpose was to create a strong federal government, the strength was to be derived, not from an unlimited grant of general authority to protect and promote the welfare of the nation, but from the exercise of certain enumerated powers which

[1] 42 *Federalist.*

were believed to be adequate for this purpose. No action affecting commerce was meant to be authorized unless it was embraced within the enumerated powers or was necessary and proper to the exercise thereof.

If the original constitutional grant of commercial powers cannot be specifically defined in terms of particular forms of regulation then under consideration, is it possible to define it in general terms? Can a general formula be worked out which with any degree of assurance can be said to express the contemporaneous understanding of the breadth of the commerce clause? No formula adequate for this purpose can be stated except the words of the Constitution itself. It cannot be said that the power to regulate interstate and foreign commerce was meant at that time to be so broad as to include a general power to foster and promote such commerce. This liberal definition of federal authority has been reached through the process of judicial interpretation. Legislation facilitating commercial intercourse, even if not actually constituting a regulation of commerce, is now considered necessary and proper to the execution of the power to regulate commerce, and, therefore, authorized by the Constitution. Statesmen of the constitutional period, however, so frequently expressed views inconsistent with this broad interpretation that we are scarcely warranted in asserting that the grant of federal commercial power was then generally understood to embrace all legislation facilitating commercial intercourse between the states.

This may be illustrated by a brief consideration of the attitude of some of these statesmen with reference to the power to create commercial corporations and to construct roads and canals. On September 14, 1787, a few days before the close of the Constitutional Convention, a motion was introduced by Franklin to add, after the post-office and post-roads clause, "a power to provide for cutting canals

where deemed necessary". Madison suggested an enlargement of the motion into a power "to grant charters of incorporation where the interest of the U. S. might require & the legislative provisions of individual States may be incompetent". Owing to fear that Madison's suggestion would carry with it a power to create commercial monopolies, Mason of Virginia favored limiting the power to the single case of canals. Even in this modified form the motion was defeated by a vote of eight states to three.[1]

At least two interpretations of this vote are possible. One is that the motion was defeated because it was superfluous so far as canals for purposes of interstate and foreign commerce were concerned, as power to construct such canals and to create corporations for those purposes would be vested in Congress as incidental to the power to regulate commerce. Under this interpretation, the only effect of the motion would have been to extend Congressional power to canals constructed for purely local purposes to which the Convention was opposed.[2] On the other hand, the motion may have been defeated because the Convention did not believe the power to regulate commerce included the power to create commercial corporations or to construct canals, even for purposes of interstate and foreign commerce, and did not desire to make any such enlargement of federal commercial powers. Both the record of the debate on the motion and subsequent references to this vote by prominent statesmen of the period are more consistent with the latter interpretation. Madison and Wilson of Pennsylvania both urged the adoption of the motion because it would facilitate interstate communication. Neither Sherman nor King, the only opponents of the motion whose words are recorded,

[1] Farrand, Max, *The Records of the Federal Convention* (New Haven, 1911), vol. ii, pp. 615-616 gives Madison's notes of these proceedings.

[2] See Brown, *Commercial Power of Congress*, pp. 131, 132.

suggested that the power was included in other provisions; on the contrary, King said that he thought the power unnecessary. It is improbable that Madison, who earnestly advocated the motion and who is the author of our record of the debate thereon, would have omitted an expression of opinion by the Convention to the effect that the powers to create commercial corporations and construct canals would pass to Congress as incidental to the commerce power, if any such opinion had been expressed. Madison, who always believed such powers *should* have been conferred upon the federal government, frequently stated his belief that the Constitution did not in fact grant them. This was his belief when as a member of Congress in 1791 he participated in the debate upon the bill creating a national bank,[1] when as President in 1817 he vetoed Calhoun's bill providing for setting apart the bonus and net proceeds of the Second National Bank as a fund for constructing roads, canals and other works of internal improvement,[2] and again in 1824 when, writing to Edward Livingston on the latter's speech on the subject of internal improvements, he said:

> My impression with respect to the authority to make them [canals] may be the stronger, perhaps, (as I had occasion to remark as to the bank, on its original discussion,) from my recollection that the authority had been repeatedly proposed in the convention, and negatived, either as improper to be vested in Congress, or as a power not likely to be yielded by the States. My impression is also very decided, that if the construction which brings canals within the scope of commercial regulations had been advanced or admitted by the advocates of the Constitution in the State conventions, it would have been impossible to

[1] Farrand, *op. cit.*, vol. iii, p. 362, citing *Annals of Congress*, First Congress, ii, p. 1896.

[2] Richardson, J. D., *Messages and Papers of the Presidents* (1907), vol. i, p. 584.

overcome the opposition to it. It is remarkable that Mr. Hamilton himself, the strenuous patron of an expansive meaning in the text of the Constitution, with the views of the convention fresh in his memory, and in a report contending for the most liberal rules of interpretation, was obliged, by his candour, to admit that they could not embrace the case of canals.[1]

Madison was undoubtedly referring to Hamilton's opinion on the constitutionality of the first Bank of the United States rendered to President Washington February 23, 1791. This opinion, strongly upholding the power of Congress to create such a bank, inaugurates the doctrine of implied powers and is one of the foremost state papers advocating a broad interpretation of federal powers under the Constitution. Any recognition therein of limits to federal commercial power is, therefore, of particular significance. In that opinion Hamilton says that, for Congress to make a corporation for the purpose of opening canals, "a special power would have been necessary, except with regard to the western territory, there being nothing in any part of the Constitution respecting the regulation of canals".[2] In view of these and other similar expressions of opinion, the adverse vote of the Convention on the canal power on September 14, 1787, can scarcely be disregarded in considering the contemporary attitude on the scope of the commercial powers of Congress.[3]

During the first quarter of the nineteenth century, when the construction of roads and canals became a problem of national importance, the prevailing opinion was that the Constitution had not given to the federal government the

[1] *Letters and Other Writings of James Madison* (J. B. Lippincott and Co., Philadelphia, 1867), vol. iii, p. 435.

[2] *Works of Alexander Hamilton* (ed. by H. C. Lodge, New York, 1885), vol. iii, p. 196.

[3] For other comments on this vote, see Farrand, *op. cit.*, vol. iii, pp. 362, 363, 375, 465.

power to adopt and execute a system of internal improvement. Jefferson, Madison, Monroe and Gallatin all supported this view. It is somewhat difficult for us to reconcile this interpretation of constitutional power with the actual appropriation and expenditure by the federal government of over $1,500,000 in the construction of the Cumberland road between Cumberland, Maryland, and the Ohio River.[1] Monroe stated his position on the subject in a document entiled "Views of the President on the Subject of Internal Improvements", submitted to the House of Representatives on May 4, 1822, in support of a veto message of the same date disapproving an act for the preservation and repair of the Cumberland road.[2] Monroe's views in substance were that no power to establish internal improvements could exist without the incidental powers of condemning lands, preserving the improvements from injury, punishing offenders against laws made to protect them, and collecting tolls; that the exercise of all such incidental powers would constitute an infringement on the sovereignty of the individual states in their own territory; and that the powers of the federal government were, therefore, utterly incompetent to the purpose in view. On the other hand, Monroe in the same document stated his belief that the federal power of appropriation, involving no exercise of legislative jurisdiction in the territory of the individual states, could be exercised in support of any such work of national importance, and that Congress could cause the sums so appropriated to be expended provided that it obtained the consent of the states in which the work was to be done. Monroe accordingly vetoed the bill which elicited this expression of his views primarily

[1] MacGill, C. E. and Meyer, B. H., *History of Transportation in the United States before 1860* (Carnegie Institution of Washington, 1917), pp. 13-16.

[2] Richardson, *op. cit.*, vol. ii, pp. 142-183.

because it imposed tolls, which in his opinon involved the power of condemnaton and of passing laws to protect the road from injury. The following year Monroe gave his approval to an act which made an appropriation for the repair of the road, but did not contain the objectionable provisions for the collection of tolls.[1]

The federal policy with respect to internal improvements during this period was substantially consistent with Monroe's views. The legislation approved by Jefferson in 1802, 1803 and 1806, which provided for the construction of the Cumberland road, required that the consent of the state through which the road should pass must be obtained before construction.[2] Gallatin, in his report of 1808 on internal communications, stated that such works could be undertaken by Congress, but only with the consent of the states in which they were located.[3] Madison's position, as stated in his veto of the bonus bill on March 3, 1817, is even more extreme than that taken by Monroe.[4] Madison, while in this veto message apparently approving of the principle that Congress could appropriate money for such purposes, finds no power for the federal government actually to undertake the work even with the consent of the states. He says:

> If a general power to construct roads and canals, and to improve the navigation of water courses, with the train of powers incident thereto, be not possessed by Congress, the assent of the states in the mode provided in the bill cannot confer the power. The only cases in which the consent and cession of particular States can extend the power of Congress are those specified and provided for in the Constitution.[5]

[1] 3 Stat. L. 728.

[2] 2 Stat. L. 173, 175, 225, 226, 357, 358.

[3] *American State Papers, Miscellaneous*, i, p. 741.

[4] Richardson, *op. cit.*, vol. i, p. 584.

[5] Richardson, *op. cit.*, vol. i, p. 585.

Jefferson, in a letter written to Gallatin in June, 1817, approved Madison's veto,[1] although as President he had previously approved legislation for the construction of the Cumberland road. The view that the federal government could not construct works of internal improvement, even with the consent of the states, did not long prevail. Monroe, who followed Madison as President, found no constitutional objection to federal appropriation and expenditure of funds for road construction, provided that the states through which the roads were laid gave their consent. This, however, falls far short of the conception of a federal power to foster and promote commerce as a part of or incidental to the enumerated power to regulate commerce.

If Gallatin, Madison and Monroe had been opponents of a broad federal commercial power, their opinion that the Constitution did not authorize Congress to undertake the construction of roads and canals would have far less weight and might be attributed to a desire to limit the scope of congressional action. No such motive, however, can be attributed to them. They were earnest advocates of federal participation in such work, if constitutional obstacles could be removed. Monroe was so deeply impressed with the need of federal power to construct roads and canals that, in his Presidential messages, he repeatedly urged the adoption of an amendment creating this power.[2]

The foregoing discussion merely shows that certain prominent statesmen of the constitutional period did not believe that the Constitution granted to the federal government the power to construct roads and canals. It is not proof of a definite intention of the state conventions ratifying the Constitution that this particular power should be withheld. But

[1] *Writings of Thomas Jefferson* (Thomas Jefferson Memorial Association ed., 1903), vol. xv, p. 131.

[2] Richardson, *op. cit.*, vol. ii, pp. 18, 179, 217.

the fact that men of such prominence, intimately associated with the adoption of the Constitution and earnestly advocating broad commercial powers, were confident that the power to construct roads and canals had not been granted to the federal government, makes it impossible for us now to assert that the Constitution was originally understood to confer upon Congress the comprehensive breadth of commercial power which subsequently has been exercised and sustained by judicial decision.

It is futile to attempt to define just what was originally intended by the phrase, "power to regulate commerce", and other provisions of the Constitution expressed in general terms. Such an attempt would at best resolve itself into the collection of divergent individual opinions. These opinions have only an academic historic interest because it is impossible to distil from them a formula which could, by any stretch of the imagination, be characterized as the collective intent of the conventions of the thirteen states which ratified the Constitution. In the absence of a general formula, we cannot apply the test of orginal intention to the power of Congress to enact particular forms of commercial legislation. Such legislation may be, and usually is, of a character unknown to the statesmen of 1787; they, therefore, could have no intention either to grant or to withhold the specific power so to legislate. The only practical solution is that suggested by Hamilton in his opinion on the constitutionality of the first Bank of the United States:

Whatever may have been the intention of the framers of a law, that intention is to be sought for in the instrument itself, according to the usual and established rules of construction. Nothing is more common than for laws to *express* and *effect* more or less than was intended. If, then, a power to erect a corporation in any case be deducible, by fair inference, from the whole or any part of the numerous provisions of the Con-

stitution of the United States, arguments drawn from extrinsic circumstances, regarding the intention of the Convention, must be rejected.[1]

This principle has necessarily been followed in the interpretation of the commercial powers of Congress by the United States Supreme Court, which has tested the authority of Congress to enact each particular form of commercial legislation by the provisions of the Constitution itself as construed by the court in the light of the peculiar facts and circumstances surrounding each case.

The creation of a general federal power to regulate interstate and foreign commerce does not necessarily imply an intention to destroy state power over these subjects.

The constitutional grant of such power was made in general terms and the restrictions upon concurrent exercise of state power were limited to certain specific forms of regulation. This shows that the grant was much broader than the restrictions and that a very extensive concurrent power was meant to be left to the states. In fact state power with respect to interstate and foreign commerce is specifically recognized in the provision of Article I, Section 10, permitting states to levy duties absolutely necessary for executing state inspection laws. The implication is clear that the states should continue to regulate such commerce by inspection laws. Moreover, the mere fact that the Convention found it necessary to place specific restrictions upon state commercial powers is convincing evidence that the delegates did not intend to make interstate and foreign commerce immune from the exercise of any form of state power. This inference is fully confirmed by a comparison between various proposals made prior to the Convention for establishing national control of commerce with the language of the com-

[1] *Works of Alexander Hamilton* (ed. by H. C. Lodge, New York, 1885), vol. iii, p. 197.

merce clause as finally adopted. In the earlier proposals we find:

> The United States in Congress assembled shall have *the sole and exclusive* right and power . . . of regulating the trade of the States, as well with foreign nations, as with each other.[1]
>
> As the local exercise within the states of the power of regulating and controlling trade can result only in discordant systems productive of internal jealousies and competitions, and illy calculated to oppose or counteract foreign measures, which are the effect of a unity of council, this house are clearly of opinion that the individual as well as the general good will be best consulted by *relinquishing to congress all these separate and independent powers*.[2]

Yet the Convention, with full knowledge of these previous proposals, did not say that "The Congress shall have sole and exclusive power" but merely that "The Congress shall have power" to regulate interstate and foreign commerce. If the Convention had definitely intended to deprive the states of all power over this subject, it presumably would have retained the words "sole and exclusive" or would have inserted an equivalent specific prohibition of state action. As previously indicated, in the case of commerce the specific prohibitions did not cover the entire field of regulation of interstate and foreign commerce, but only certain

[1] Report of a committee of Congress, 1785, of which James Monroe was chairman, Sparks, Jared, *The Writings of George Washington* (Boston, 1835), ix, p. 503. Italics mine.

[2] Instructions to the Pennsylvania delegates in Congress, 1783, Bancroft, George, *History of the Formation of the Constitution of the United States of America* (3rd ed., New York, 1883), vol. i, p. 335. Italics mine. Brown, D. W., *The Commercial Power of Congress Considered in the Light of its Origin* (New York, 1910), pp. 133-5, gives extracts from eleven different proposals of federal commercial power, including the two just cited. Of these, five in express terms sought to make the federal authority exclusive.

enumerated forms of such regulation, of which the most important was the imposition of duties on exports, imports and tonnage.

Probably no member of the Convention was more nationalistic than Alexander Hamilton. Yet Hamilton, in the *Federalist,* devoted a paper to demonstrating the proposition that the taxing power was concurrent and not exclusive except as state action was expressly prohibited by the Constitution.[1] His general argument is equally applicable to the commerce power. He says:

> . . . As the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant. I use these terms to distinguish this last case from another which might appear to resemble it, but which would, in fact, be essentially different; I mean where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the policy of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority. . . .
>
> The necessity of a concurrent jurisdiction in certain cases results from the division of the sovereign power; and the rule that all authorities, of which the States are not explicitly divested in favor of the Union, remain with them in full vigor, is not a theoretical consequence of that division, but is clearly admitted by the whole tenor of the instrument which contains the articles

[1] 32 *Federalist.*

of the proposed Constitution. We there find that, notwithstanding the affirmative grants of general authorities, there has been the most pointed care in those cases where it was deemed improper that the like authorities should reside in the States, to insert negative clauses prohibiting the exercise of them by the States. The tenth section of the first article consists altogether of such provisions. This circumstance is a clear indication of the sense of the convention, and furnishes a rule of interpretation out of the body of the act, which justifies the position I have advanced and refutes every hypothesis to the contrary.

To apply Hamilton's own words to the commerce power, the Constitution did not "in express terms" grant "an exclusive authority to the Union"; excepting specific forms of regulation, it did not grant "in one instance an authority to the Union, and in another" prohibit "the States from exercising the like authority"; it did not grant "an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant". It is true that some forms of state commercial regulation would be absolutely and totally contradictory and repugnant to similar national authority, such as state power to prohibit foreign trade, but this does not apply to the entire field of commercial regulation. To a large extent, the regulation of interstate and foreign commerce seems to fall within the category of powers "where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the policy of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority". Hamilton carefully distinguishes powers of the latter description from those where concurrent jurisdiction is from the nature of the subject impossible.

Among the applications of the powers affecting commerce in which there is the most conflict of jurisdiction between

the nation and the states in the regulation of interstate carriers, are the regulation of rates, fares and service and the general exercise of the police power to protect the morals, health and safety of the community. In 1787, however, such problems had not assumed national importance and undoubtedly received no specific consideration in the Constitutional Convention. Railroads were unknown; the regulation of tolls and charges for transportation was distinctly a matter of local concern; and the general exercise of the police power to protect the public morals, health and safety was in its infancy and seldom raised problems of more than local interest. We, therefore, look in vain to the Constitution for any specific guidance in determining whether the nation or the states or both may so regulate interstate and foreign commerce. What we do find is a general purpose to give the federal government adequate powers to meet national needs, specific prohibition of certain forms of state regulation of interstate and foreign commerce, and express or implied recognition of state power to regulate such commerce in other ways. From the instrument itself, therefore, no hard-and-fast rules can be deduced which definitely and precisely draw the line between the commercial powers of the nation and the states. As newer and varied forms of regulation were introduced, it became necessary to develop the principles of the distribution of commercial powers by judicial interpretation of the Constitution, each case being decided in the light of its own particular facts and circumstances.

The Constitution contains no express grant to the United States of power to regulate commerce wholly within the limits of a single state. The absence of an express grant, however, is not equivalent to a prohibition of all federal action affecting such commerce. Under the provisions of the last clause of Section 8, Article I, Congress may make

any laws which may be necessary and proper for carrying into execution the other federal powers enumerated in the Constitution. Federal authority under this "necessary and proper" clause clearly does not embrace the entire field of regulation of intrastate commerce. Such regulation includes many subjects which are of local concern and are not closely related to the enumerated federal powers. A general power to regulate intrastate commerce as such is not delegated to the United States by the Constitution, nor is it prohibited to the states. The provisions of the Tenth Amendment, ratified in 1791, are clearly applicable: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People."

This amendment was merely declaratory of the rule which the framers of the Constitution understood to be applicable with respect to powers not granted to the United States.[1] Therefore, the general power of regulating commerce wholly within the limits of a single state was intended to be a reserved power which might be exercised through state governments, subject, however, to such federal legislation as might be enacted under the authority of the "necessary and proper" clause.

The constitutional provisions quoted in this chapter, together with the reservation of state power confirmed by the Tenth Amendment, constitute the Magna Charta of the power to regulate commerce in the United States. They are the foundation upon which courts have subsequently erected an elaborate structure of interpretative decisions, at times almost legislative, here restricting and there extending the sphere of national and state regulation of commerce.

This chapter has attempted to outline the character and purpose of the original constitutional grant of commercial

[1] See extracts from 32 *Federalist*, quoted *supra*, p. 54.

powers to the government of the United States in the light of the circumstances existing when the Constitution was adopted. The purpose was to clothe the federal government with commercial powers adequate to protect national interests, and to prevent the recurrence of evils such as those experienced during the period of the Confederation when Congress had substantially no commercial authority. The grant was, therefore, not meant to be limited to those specific forms of commercial regulation for which at that time unified federal control was imperative. Just how much more federal commercial power was intended, it is impossible to state. Although a general federal power to regulate interstate and foreign commerce was created, contemporary evidence does not support the conclusion that it was intended to deprive the states of all concurrent jurisdiction. The instrument itself indicates that no such intention existed and that its purpose was to place restrictions upon rather than to destroy state jurisdiction over interstate and foreign commerce. While expressly establishing the supremacy of federal legislation where state laws should conflict therewith, it still left room for state action. The general power of regulating intrastate commerce was left to the states, subject, however, to the exercise of the enumerated federal powers and federal laws necessary and proper to their execution. It was impracticable, nor would it have been desirable, to prepare an instrument so explicit in its terms as to remove all doubts concerning its purport. The framers had to content themselves with an outline of general principles to be more definitely developed with the lapse of time and the growth of the nation. This development will be traced in subsequent chapters.

CHAPTER II

JUDICIAL INTERPRETATION OF FEDERAL AND STATE POWERS. 1789-1887

THE decisions of the United States Supreme Court, which interpret the constitutional grant of federal power over interstate carriers and its effect upon state power, are so numerous that it will facilitate the discussion to divide them chronologically. The first period to be discussed ended with the enactment of the Interstate Commerce Act of 1887. During this period, the federal government exercised little direct authority over interstate carriers. Consequently the decisions of those years relate more to the definition of state than of federal power. So far as the Court sought to define federal power, its decisions prior to 1887 were characterized by the statement of broad general principles rather than by numerous specific applications of those principles. The subsequent years, however, have witnessed the growth of a comprehensive and detailed regulation of interstate carriers by the federal government. As a result, the Supreme Court not only had occasion to develop new principles of interpretation of federal commercial power, but also was called upon to make a multitude of specific applications of the commerce clause to various forms of federal legislation. The present chapter will be devoted to decisions made during the first period, and the decisions of the later years will be considered in the next two chapters.

In accordance with the plan outlined in the introduction,

these three chapters will include only decisions which help to answer one of the two following questions:

1. What powers over interstate carriers are given by the Constitution to the federal government?

2. What restraints on state power over interstate carriers are imposed by the Constitution by virtue of its grant of federal powers?

It might appear at first glance that this states not two questions, but only one; that every such federal power created by the Constitution implies a coextensive restraint on the exercise of state power. This view obtained strong support during the first sixty years of constitutional interpretation. But it was finally decided that the mere grant to the federal government of the power to regulate interstate and foreign commerce did not absolutely exclude the states from this field of regulation, and that to a certain extent the existence of federal commercial power was not inconsistent with the coexistence of similar state power. This, of course, is the doctrine of concurrent powers so ably expounded by Hamilton in the *Federalist*.[1] It is this doctrine of concurrent powers which makes it necessary to state two questions for consideration in this and the subsequent chapters on judicial interpretation. Having ascertained that the Supreme Court has decided that Congress has a particular form of commercial power, it is still necessary to inquire whether a state may also exercise similar power in the absence of conflicting federal legislation. There is the further question whether particular acts of Congress conflict with the exercise of similar power by the states. Decisions relating only to this question will be considered in a later chapter on the congressional exercise of commercial powers, as they help to interpret the specific effects of federal legislation on state powers, rather than the effect of the Constitution itself.

[1] 32 *Federalist*. See pp. 54, 55, *supra*.

The judicial interpretation of federal power will be considered first. The case of *Gibbons* v. *Ogden,* decided by the United States Supreme Court in 1824,[1] gives careful consideration to the meaning of the "power to regulate commerce . . . among the several states." This decision arose from an attempt to enforce a monopoly, granted by the State of New York, of steamboat navigation of the waters of that state. In the period immediately following the invention of the steamboat, Robert Livingston and Robert Fulton had obtained such a monopoly by grant of the New York legislature, and had assigned to Ogden the right to navigate between New York City and New Jersey. Ogden sought to restrain Gibbons from navigating two steamboats between New York City and Perth Amboy, New Jersey. The latter's steamboats bore federal licenses under an act of Congress of 1793 regulating the coasting trade [2] and Gibbons claimed that his rights arising under the laws of the United States could not be defeated by state legislation.

This decision was of national interest, not only because of the importance of the New York monopoly, but also because the fate of similar monopolies in other parts of the United States depended upon the result. The most important of these was the grant by Louisiana to Livingston and Fulton of the exclusive privilege of steamboat navigation on the waters of that state.[3] This grant had aroused violent opposition in Ohio and other states to which free access to New Orleans by the Mississippi river was of the utmost importance.[4] Other grants of like character had been made by New Hampshire, Massachusetts, Connecticut, Pennsylvania

[1] 9 Wheat. 1.

[2] 1 Stat. L. 305.

[3] MacGill, C. E. and Meyer, B. H., *History of Transportation in the United States before 1860* (Carnegie Institution of Washington, 1917), p. 104.

[4] *Ibid.*, pp. 105, 106.

and Georgia.[1] The New York monopoly had led to retaliatory legislation in New Jersey and Ohio. The New Jersey act imposed damages and treble costs against any party enforcing the New York monopoly against a citizen of New Jersey, and the Ohio act closed its ports on the shores of Lake Erie to Livingston, Fulton and their assignees, unless similar privileges were granted by New York to citizens of Ohio.[2] The situation was somewhat similar to the interstate tariff wars of the Confederation.

From the standpoint of federal power, the issue raised in *Gibbons* v. *Ogden* was whether Congress, under the commerce power, could authorize interstate navigation wholly within the territorial waters of adjacent states contrary to the provisions of state laws. The decision sustained such congressional authority and denied to Ogden the injunction which he sought to restrain Gibbons from infringing upon his monopoly. In reaching this conclusion, Chief Justice Marshall analyzed the commerce clause of the United States Constitution, and carefully defined the meaning of the words "commerce", "regulate", and "among the several states." His definitions of these terms are of such importance in subsequent constitutional interpretation that they will be quoted here. As to the meaning of "commerce", he says:

> The counsel for the appellee [Ogden] would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more; *it is intercourse.*[3] It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.[4]

[1] MacGill, *op. cit.*, pp. 106, 256.

[2] *Ibid.*, pp. 106, 107.

[3] Italics mine.

[4] 9 Wheat. at 189, 190.

" Among the several States " is thus defined:

> The word "among" means intermingled with. A thing which is among others is intermingled with them. Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior. . . .
>
> Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one. . . . The completely internal commerce of a state, then, may be considered as reserved for the state itself.
>
> But, in regulating commerce with foreign nations, the powei of Congress does not stop at the jurisdictional lines of the several states. It would be a very useless power if it could not pass those lines. . . . If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the states, if a foreign voyage may commence or terminate at a port within a state, then the power of Congress may be exercised within a state.
>
> This principle is, if possible, still more clear when applied to commerce "among the several states." . . . Can a trading expedition between two adjoining states commence and terminate outside of each? And if the trading intercouse be between two states remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the states, must of necessity, be commerce with the states. . . . The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several states.[1]

The term " regulate " is very simply defined. To regulate is "to prescribe the rule by which commerce is to be governed".[2]

Ogden's counsel did not attempt to deny that Congress had power to regulate the coasting trade. Their position was that Gibbon's boats were not engaged in that trade, and that the power of Congress over the coasting trade did not ex-

[1] 9 Wheat. at 194-196.

[2] *Ibid.* at 196.

tend to the regulation of the transportation of passengers between points in adjacent states. Marshall, however, could find no clear distinction " between the power to regulate vessels employed in transporting men for hire, and property for hire ".[1]

It is true that this case definitely decides only that Congress may regulate navigation by licensing vessels to engage in the transportation of passengers for hire between points in different states, and thereby authorize such navigation, state laws to the contrary notwithstanding. But the reasons for the decision stated by the Court lay the foundation for a broad interpretation of federal commercial power. The conclusion of the Court was based upon its view that the power to regulate commerce among the several states meant the power to prescribe the rule, not only for the interchange of commodities, but also for intercourse between different states, that in its application there was no distinction between the transportation of men and property for hire, and that it could be exercised within the territorial jurisdiction of the several states.

The views of the extent of the federal power to regulate commerce, expressed in *Gibbons* v. *Ogden,* were elaborated and applied in other decisions in the period now under consideration. The *Passenger Cases,* decided in 1849,[2] involved the power of Congress to regulate immigration. The various opinions in the *Passenger Cases* are of chief value in their treatment of state commercial powers and will be considered later in the chapter under that subject. From the standpoint of federal power, the *Passenger Cases* are important because the five majority justices all took the position that a tax on immigrants was a regulation of commerce with foreign nations, and that the regulation of immigration was

[1] 9 Wheat. at 215.

[2] 7 How. 283.

a proper subject of Congressional action. They thus affirm and apply to immigration the doctrine expressed in *Gibbons* v. *Ogden* that the federal commerce power is equally applicable to the transportation of persons and property.[1]

Both *Gibbons* v. *Ogden* and the *Passenger Cases* relate to transportation by water, or, to use a more general term, navigation. While the basic principles involved in Marshall's definitions of the terms used in the commerce clause are equally applicable to transportation by land, he used these definitions only to prove that Congress had power to regulate navigation. Towards the close of the period under consideration the federal power to regulate interstate transportation by land was expressly recognized by the Supreme Court. That such recognition was not given earlier is undoubtedly due to the fact that there was little direct exercise of federal control of land transportation in the earlier years of our history. The minority opinion in *Crandall* v. *Nevada*, decided in 1868,[2] held that a state tax of $1.00 on every passenger leaving the state of Nevada, obviously by land, was invalid because the power to regulate such transportation was vested in Congress. The majority, while finding the tax invalid on other grounds, did not consider it to be a violation of the commerce clause. The opinion was based, however, on the fact that the tax was local, not national, in its operation, and was in no sense a declaration that land transportation was beyond congressional control. On the contrary, the emphasis laid by the majority opinion on the local character of the tax implies recognition of the existence of federal power to regulate land transportation by legislation of a national character having a uniform operation over the whole

[1] The existence of federal power to regulate immigration is also the basis of the decision in *Henderson* v. *Mayor of New York* (1876), 92 U. S. 259.

[2] 6 Wall. 35.

country. The *Case of the State Freight Tax,* decided in 1873,[1] held that the power of Congress to regulate interstate commerce was unconstitutionally invaded by a state tax on all freight carried in the state of Pennsylvania, including interstate shipments by railroad. The ground for this decision is thus summarized by the Court:

> The rule has been asserted with great clearness, that whenever the subjects over which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress. [Citing *Cooley v. Board of Wardens* (1851), 12 How. 299; *Gilman v. Philadelphia* (1866), 3 Wall. 713; *Crandall v. Nevada, supra.*] Surely transportation of passengers or merchandise through a state, or from one state to another, is of this nature.[2]

The cases cited in this quotation, while stating the rule, did not apply it to land transportation; the *Cooley* and *Gilman* cases concerned navigation, and the decision in the *Crandall* case, as already pointed out, was based on other grounds. The *State Freight Tax* case, however, leaves no room for doubt that the Supreme Court interpreted the commerce clause as including federal power to regulate transportation by land as well as by water. This case was soon followed by others which also recognized land transportation as a subject embraced in the federal commerce power.[3] Federal

[1] *Reading R. R.* v. *Pennsylvania,* 15 Wall. 232.

[2] 15 Wall. 279.

[3] *Welton* v. *Missouri* (1876), 91 U. S. 275; *Wabash, St. L. & P. Ry.* v. *Illinois* (1886), 118 U. S. 557. See also *Chicago, B. & Q. R. R.* v. *Iowa* (1877), 94 U. S. 155; *Peik* v. *Chicago & N. W. Ry.* (1877), 94 U. S. 164; *Railroad Commission Cases* (1886), 116 U. S. 307. In these three cases state statutes regulating transportation by rail were sustained, but the Supreme Court clearly recognized the existence of concurrent federal power. All of the decisions cited in this note arose from state legislation affecting land transportation, and will be considered more fully later in the chapter under the discussion of state power.

jurisdiction over the regulation of interstate transportation, both by land and by water, had thus become firmly established by judicial decision prior to the Interstate Commerce Act of 1887.

To state in general terms that Congress has power to regulate interstate transportation is, however, indefinite. Owing to the comparative inactivity of Congress in exercising authority over transportation during the period under discussion, the Supreme Court had little opportunity to express an opinion concerning the validity of specific forms of federal regulation and the scope of authorized federal action. Federal regulation of navigation, however, led to the decision in *The Daniel Ball* (1871) [1] which greatly broadened the conception of the extent to which congressional control of the highways and vehicles of interstate transportation could be exercised within the borders of a single state. Five years previously, the Court had stated in *Gilman* v. *Philadelphia* [2] that " the power to regulate commerce comprehends the control for that purpose and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie." This statement, however, has only the force of a dictum as the decision sustained the authority of a state to authorize the construction of a bridge across such waters in the absence of conflicting federal laws, and the same result would have been attained, even if the court had believed that Congress had no authority over the particular stream in question, the Schuylkill River, which lay wholly within the state of Pennsylvania. But the opinion made it clear that the Court recognized the power of Congress to control this stream. In *The Daniel Ball,* however, the situation presented to the Court was not congressional inactivity as in the *Gilman* case, but the actual

[1] 10 Wall. 557.

[2] (1866), 3 Wall. 713.

exercise of the federal commerce power over a stream, the Grand River, lying wholly within the state of Michigan. The Court sustained the power of Congress to require a vessel navigating that stream to take out a federal license, although the vessel's construction did not permit it to leave the state.

The decision was based upon the conception of the existence of a chain of highways of interstate commerce designated as "the navigable waters of the United States" over which Congress has complete regulatory power because of their use for interstate commerce. The Grand River, which the *Daniel Ball* navigated, was held to be a part of these navigable waters of the United States over which Congress had jurisdiction because it formed by uniting with the waters of Lake Michigan "a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water".[1] The commercial power of Congress over such waters is described in the opinion:

> That power authorizes all appropriate legislation for the protection or advancement of either interstate or foreign commerce, and for that purpose such legislation as will insure the convenient and safe navigation of all the navigable waters of the United States, whether the legislation consists in requiring the removal of obstructions to their use, in prescribing the form and size of vessels employed upon them, or in subjecting the vessels to inspection and license, in order to insure their proper construction and equipment.[2]

But it was objected that the power of Congress does not extend to the requirement of a license of a vessel engaged only in the internal commerce of Michigan even if the Grand

[1] 10 Wall. at 563.

[2] *Ibid.* at 564.

River is a navigable water of the United States. This objection was met by pointing out that the vessel was engaged in carrying goods destined to or brought from other states, and to that extent it was engaged in commerce between the states and, therefore, subject to congressional legislation.[1] The federal power over the river itself, as conceived by the Court, would have seemed sufficient ground for the decision, irrespective of the destination or origin of the goods carried. But the interstate character of the vessel's freight having been considered by the Court, the case may be considered authority for the proposition that Congress may regulate an agency employed in commerce between the states even when it is confined in its actions entirely within the limits of a single state. It is true that the Court declined to express an opinion as to whether the same doctrine would apply to transportation by land, but the reasoning is as applicable to artificial highways, such as canals, roads and railways, as it is to the navigable waters of the United States. The underlying principle of the *Daniel Ball* decision that the highways and instruments of interstate commerce are embraced within the federal commercial power, as well as the commerce itself, has been extended to transportation by artificial highways [2] and is the basis of much of the federal legislation now affecting interstate carriers.

Another decision of this period deserves attention, although the subject of regulation was not transportation, but communication by telegraph. This is *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, decided in 1878,[3] in which the power of Congress, under the commerce clause, to establish and regulate communication by telegraph is sus-

[1] 10 Wall. at 565.

[2] See *Monongahela Navigation Co.* v. *United States* (1893), 148 U. S. 312, 342. See pp. 122, 123, *infra*.

[3] 96 U. S. 1.

tained. The point of interest, from the standpoint of the present discussion, is the following statement in the opinion:

> Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the national government.
>
> The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances.[1]

This statement is entirely inconsistent with a narrow interpretation of federal commercial power limiting it to certain particular forms of regulation for which immediate need of federal authority was felt in 1787, and is in accordance with the suggestion in the previous chapter that the circumstances and events, contemporaneous with the adoption of the Constitution, indicate an intention to grant a general power without such restriction.

Congress, prior to 1887, enacted no legislation exercising control over the rates charged for interstate transportation. Its power to do so was suggested in the granger cases decided in 1877,[2] but at this time the Court was willing to sustain state legislation regulating rates on interstate traffic to or from points within the state "until Congress acts", and Congress not having acted, there was no necessity for a clean-cut decision sustaining similar federal power. Nine years later, however, the Court was less complacent with state interference with interstate transportation, and in *Wabash, St. Louis and Pacific Railway* v. *Illinois* (1886),[3] definitely de-

[1] 96 U. S. at 9.

[2] *Chicago, B. & Q. R. R.* v. *Iowa*, 94 U. S. 155; *Peik* v. *Chicago & N. W. Ry.*, 94 U. S. 164.

[3] 118 U. S. 557.

cided that a state statute was invalid which defined and penalized unjust discrimination in charges for interstate transportation. In the course of its opinion, the Court explicitly stated that the regulation of the rates charged for interstate transportation " should be done by the Congress of the United States under the commerce clause of the Constitution ".[1] The interpretation of the commerce clause contained in this decision is the foundation of the policy of federal control of rates charged for interstate transportation inaugurated with the Interstate Commerce Act of 1887.

From the decisions subsequent to *Gibbons* v. *Ogden* which have been considered, it should be clear that the general conception of the scope of the federal commerce power was given ever widening application as the need for federal authority expanded. The opinion of Mr. Justice Field in *County of Mobile* v. *Kimball,* decided in 1881,[2] gives in general terms a picture of the breadth of the Court's conception of this power of Congress:

> That power is indeed without limitation. It authorizes Congress to prescribe the conditions upon which commerce in all its forms shall be conducted between our citizens and the citizens or subjects of other countries, and between the citizens of the several states, and to adopt measures to promote its growth and insure its safety. And as commerce embraces navigation, the improvement of harbors and bays along our coast, and of navigable rivers within the states connecting with them, falls within the power. The subjects, indeed, upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment.[3]

So far the decisions of the Supreme Court have been considered solely with reference to the power of Congress to

[1] 118 U. S. 577.

[2] 102 U. S. 691.

[3] *Ibid.* at 696.

regulate interstate commerce under the commerce clause of the Constitution. There still remains for discussion the power of Congress to regulate commerce wholly within the limits of a single state. No such power was expressly granted by the Constitution, but intrastate commerce is often so closely related to interstate commerce, that federal action affecting the former, if not actually a regulation of the latter, is at least necessary and proper to make such regulation effective. Therefore, it is appropriate to consider what force the Supreme Court has given to the provision that Congress shall have power "to make all laws which shall be necessary and proper for carrying into execution" the other powers conferred by the Constitution. The classic interpretation of this clause is given by Chief Justice Marshall in *McCulloch* v. *Maryland,* decided in 1819.[1] This case involved the question whether Congress had power to incorporate the Bank of the United States. As no express grant of such power was contained in the Constitution, recourse was had to the "necessary and proper" clause to justify the action of Congress as incidental to the enumerated fiscal powers. Counsel opposed to the Bank argued that this clause authorized only such legislation as was absolutely indispensable to the execution of a granted power, and did not contemplate a choice of appropriate means if its execution could possibly be attained without recourse thereto. To this argument Marshall replied:

> Is it true, that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end,

[1] 4 Wheat. 316.

is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. . . .

. . . To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. . . .

In ascertaining the sense in which the word "necessary" is used in this clause of the Constitution, we may derive some aid from that with which it is associated. Congress shall have power "to make all laws which shall be necessary and proper to carry into execution" the powers of the government. If the word "necessary" was used in that strict and rigorous sense for which the counsel for the state of Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible effect of which is to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation not straitened and compressed within the narrow limits for which gentlemen contend.

. . . Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.[1]

To justify legislation as within the authority of the necessary and proper clause, it is, therefore, not essential to show that it is a *sine qua non* to the execution of some granted power. While the judgment of Congress as to the appropriateness and applicability of such legislation to constitutional functions of the federal government is entitled to great weight, it is not conclusive; the Supreme Court has never recognized the necessary and proper clause as a blanket authority for un-

[1] 4 Wheat. at 413, 415, 418, 419, 421.

restrained congressional action. It refuses to sustain legislation for which, in its judgment, the federal powers enumerated in the Constitution afford no reasonable basis.

The Court took this attitude towards federal legislation, which in fact regulated commercial transactions wholly within one state, in *United States* v. *De Witt,* decided in 1870.[1] In this case a provision of a federal statute prohibiting the sale of illuminating oil, inflammable at a temperature of less than 110 degrees Fahrenheit, was held invalid. An attempt was made to justify this provision as necessary and proper to the federal taxing power because, it was argued, the prohibition would increase the sales of other grades of oil which were subject to federal taxation This far-fetched argument was summarily rejected by the court and the statute was treated in its true light as an attempt by Congress to impose a police regulation relating exclusively to the internal trade of the states. Chief Justice Chase stated the principle applicable to federal control of intrastate commerce in the opinion as follows:

> That Congress has power to regulate commerce with foreign nations and among the several states, and with the Indian tribes, the Constitution expressly declares. But this express grant of power to regulate commerce among the states has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate states; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested.[2]

It is thus clear that there is no constitutional authority for federal regulation of intrastate commerce as such. This, however, is not equivalent to a decision that such regulation

[1] 9 Wall. 41.

[2] *Ibid.* at 43.

is under all circumstances prohibited. In the *De Witt* case, the Court was unable to find a substantial connection between the federal regulation of intrastate commerce and the enumerated powers of Congress. But where such a substantial connection does exist, and where federal legislation affecting commerce wholly within the limits of a single state tends to promote or facilitate commerce between the states, then Marshall's interpretation of the "necessary and proper" clause seems applicable to sustain such legislation as necessary and proper to the execution of the power to regulate interstate commerce.

There are other forms of federal legislation affecting commerce which, if not actual regulations of interstate commerce, are at least necessary and proper to such regulation. Of such a character are federal laws creating corporations to engage in interstate transportation and granting franchises to construct and operate interstate railways. The constitutionality of such laws was implicitly recognized in the *Pacific Railroad Removal Cases* in 1885 [1] by a decision that suits against a corporation, created to construct an interstate railroad by federal laws which conferred the power to sue and to be sued, arose under the laws of the United States and were, therefore, removable to the federal District Court. It makes little difference whether federal legislation of this character is characterized as a regulation of interstate commerce, or as necessary and proper to such regulation. If there is any doubt as to whether an act of Congress is embraced within the power expressly granted in the commerce clause, it can frequently be sustained under the "necessary and proper" clause, the application of which can thus be used to avoid the absurd dialectics of a minute analysis of the words "to regulate commerce among the several states". It is doubtful whether the Court in the *Pacific Railroad Removal*

[1] 115 U. S. 1.

Cases had the "necessary and proper" clause in mind in giving effect to the federal laws there under consideration. The case is of interest in showing that the Court in 1885 accepted as a matter of course the validity of federal legislation incorporating a company to construct and operate a highway of interstate commerce, which Hamilton, Madison, and Monroe would have considered beyond the scope of congressional power. Whether the result was due to a change in the interpretation of the commerce clause itself or to an enlarged conception of the effect of the "necessary and proper" clause, the fact remains that the Court was free from the doubts which beset the statesmen of earlier days and, without debating the power of Congress to enact it, enforced legislation designed to provide facilities for interstate transportation.

We now turn from the interpretation of federal commercial power to a much more complicated and difficult problem: the extent to which the states may constitutionally regulate interstate commerce. State legislation which attempts such regulation is usually enacted in the exercise of either the police power or the taxing power. Police power is here used in its broader sense as including "regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety".[1] Both the police power and the taxing power have always been recognized as among the powers reserved to the states. On the other hand, the power to regulate commerce among the several states was expressly granted to Congress by the Constitution. From the criterion of purpose, the commerce power is, however, not a separate and independent function of government, but is merely a manifestation of the police or the taxing power, as substantially all regulation of commerce is imposed either to promote the health, safety, morals or general welfare of

[1] *Chicago, B. & Q. R. R.* v. *Illinois* (1906), 200 U. S. 561, 592.

the community, or to raise revenue. We have, therefore, a situation in which the states throughout our history have been seeking to exercise fundamental powers admittedly reserved to them over a subject matter entrusted by the Constitution to the supervision of Congress. It is not surprising that this situation should lead to much confusion in determining the extent to which the states are deprived of their police and taxing powers by the express grant to Congress of power to regulate commerce. To declare that all state legislation affecting interstate commerce was prohibited by the commerce clause was manifestly impossible; the indirect effects of legislation required by local needs are so widespread and so easily reach interstate commerce, that such an interpretation would have destroyed the governments of all the states. The other extreme is not so manifestly absurd, namely to declare that all exercises of the police and taxing powers of the states are valid unless expressly prohibited or in actual conflict with laws of the United States enacted in pursuance of the powers granted to Congress by the Constitution. If such an interpretation had been adopted, Congress could still have interposed to protect interstate commerce from undue interference by state legislation. The Supreme Court, however, was unwilling to entrust the protection of interstate commerce unreservedly to the care of Congress, and it has accordingly built up an imposing barrier of constitutional interpretation against state interference with interstate commerce. This barrier, however, is not so solid or extensive as to exclude all state action on the subject. The Court has taken a middle ground; in the absence of express prohibition either in the Constitution or laws of the United States, the validity of state legislation affecting interstate commerce is made to depend upon the character and intensity of its interference therewith.

In attempting to distinguish between state action which is

permitted and that which is prohibited, various efforts have been made to work out a logical abstract basis for such distinction. This has resulted in tangling the discussion in a net of verbiage. It will hardly be possible to keep the present consideration of the problem clear of the meshes of this net because we have to consider many of the decisions by which the net is woven. We must face the fact that the Court distinguishes between certain subjects of national importance requiring a uniform rule of regulation throughout the nation, over which the jurisdiction of Congress is "exclusive", and other subjects of only local importance permitting diversity of regulation over which the states have "concurrent" jurisdiction. The Court has classified some state legislation affecting interstate commerce as "regulations" of that subject, and other legislation, also affecting interstate commerce, has been excluded from this classification, as not "regulatory" but only "incidentally affecting" the subject. In determining the constitutionality of state action, the tests applied to "regulations" are quite different from those applied to acts which are not "regulations". No attempt will be made to work out a definite rule for such classification. In general it may be said that the distinction is based upon a comparison of the interference with interstate commerce with the needs for local regulation of subjects conceded to be within the jurisdiction of the states, and that where the former predominates, the state action is classified as a regulation of interstate commerce. As the discussion proceeds, specific illustrations will be given of the way in which the Court has applied this distinction. Such verbal distinctions usually have no underlying basis in principle and are mere nomenclatures for the classification of decisions for which the real basis is a judicious balancing of national commercial interests with local needs. We can, however, work out a few fairly reliable empirical rules to which most of

the decisions conform, with the understanding that they are not absolute, and that the particular considerations in specific cases for or against the support of state police and revenue measures may, in the judgment of the Court, warrant departure from these rules.

In the cases in which the state action was considered to be a regulation of interstate or foreign commerce, it took the Supreme Court some time to reach the conclusion that state power was not entirely destroyed by the Constitution. It was never the doctrine of the Court that the mere grant of a power to Congress was equivalent to the prohibition of the exercise of the same power by a state. The Constitution gave to Congress the power to establish uniform laws on the subject of bankruptcies throughout the United States, but in 1819 the Supreme Court held that a state had authority to pass a bankruptcy law since Congress had not yet acted in the exercise of this power, saying:

It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states.[1]

But Chief Justice Marshall's opinion in this case gave warning that:

Whenever the terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislatures as if they had been expressly forbidden to act on it.[2]

Did this warning apply to state power to regulate interstate

[1] Chief Justice Marshall in *Sturges* v. *Crowninshield*, 4 Wheat. 122, 196.

[2] *Ibid.* at 193.

and foreign commerce? For many years the Court seemed uncertain how this question should be answered. Counsel in *Gibbons* v. *Ogden* argued that the states still possessed this power which could be exercised by them in any ways not in conflict with federal legislation.[1] Marshall, himself, avoided a definite answer. In *Gibbons* v. *Ogden*[2] and *Brown* v. *Maryland*,[3] the most important cases involving state power to regulate commerce in which he wrote opinions, it was unnecessary to decide whether any such power remained in the states because the particular state legislation attacked in each of these cases could be held invalid as inconsistent with existing laws of the United States. In the *Gibbons* case, the state legislation authorizing a monopoly of steam navigation conflicted with the federal coasting trade act authorizing others to navigate the same waters; in the *Brown* case, a state law taxing the sale of imports was held to violate federal laws authorizing importation. These cases, therefore, could be and were disposed of without deciding the broader question whether the state legislation involved would have been invalid merely because of the existence of federal power to regulate commerce, and irrespective of congressional action under that power. But in both of these opinions Marshall says much which would indicate that he believed that the grant to Congress of power to regulate commerce was in its nature inconsistent with the continued exercise of the same power by the states. For example, we find in his opinion in the *Gibbons* case:

> It has been contended by the counsel for the appellant that, as the word to "regulate" implies in its nature full power over the thing to be regulated, it excludes, necessarily, the action of

[1] (1824), 9 Wheat. 1, 60-65, 70, 71.

[2] (1824), 9 Wheat. 1.

[3] (1827), 12 Wheat. 419.

all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated.

There is great force in this argument, and the court is not satisfied that it has been refuted.[1]

Marshall, however, said in substance that laws, such as inspection laws, might be passed by the states in the exercise of powers not surrendered to the general government which, if passed by Congress, would be regarded as an exercise of the power to regulate commerce among the states; "the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers."[2] This view explains his position in *Willson* v. *Black Bird Creek Marsh Co.*,[3] which is sometimes regarded as evidence that he recognized the existence of state power to regulate interstate commerce. His opinion in that case sustained state legislation authorizing the construction of a dam obstructing a comparatively unimportant navigable stream, and shows that he regarded the state act, not as a regulation of commerce, but as a measure calculated to enhance the value of property on the banks of the stream by excluding water from a marsh and to improve the health of the inhabitants. The attainment of these objects being within the reserved powers of the states, the state act was sustained, there being no federal laws protecting the stream from obstruction. Thus Marshall sustained the power of the states to control interstate commerce to a considerable degree in the exercise of powers not granted to

[1] 9 Wheat. at 209.

[2] *Ibid.* at 204.

[3] (1829), 2 Pet. 245.

Congress without giving specific recognition to the existence of any concurrent state power to regulate commerce between the states. His position suggests the distinction subsequently made by the Court between state legislation "regulating" commerce and that which only "incidentally affects" it.

The existence of state power to regulate interstate commerce was seriously considered in the *License Cases* in 1847.[1] It can hardly be said that any decision was reached on this particular question. The *License Cases,* like some other decisions of the period, were disposed of without any opinion presenting the views of a majority of the Court, six of the nine Justices writing separate opinions. One of these cases involved a New Hampshire statute prohibiting the sale of liquor without state license even when sold in the container in which it was brought from outside the state. While the Supreme Court was unanimous in sustaining this statute, two distinct positions are found in the opinions, one that it was not a regulation of interstate or foreign commerce, the other that it was a regulation of commerce but that such regulations are valid unless they come in conflict with a law of Congress. An analysis of the various opinions to determine which of these views represented the opinion of the majority would now serve no useful purpose. The decision is important as showing the growing disposition of members of the Court to recognize that the states had some power to regulate interstate commerce notwithstanding the commerce clause of the Constitution. Chief Justice Taney clearly states this position in his opinion:

> . . . The controlling and supreme power over commerce with foreign nations and the several states is undoubtedly conferred upon Congress. Yet, in my judgement, the state may, nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of

[1] 5 How. 504.

commerce for its own ports and harbors, and for its own territory; and such regulations are valid unless they come in conflict with a law of Congress. . . .

. . . And if it was intended to forbid the states from making any regulations of commerce, it is difficult to account for the omission to prohibit it, when that prohibition has been so carefully and distinctly inserted in relation to other powers, where the action of the state over the same subject was intended to be entirely excluded. But, if, as I think, the framers of the Constitution (knowing that a multitude of minor regulations must be necessary, which Congress amid its great concerns could never find time to consider and provide) intended merely to make the power of the federal government supreme upon this subject over that of the states, then the omission of any prohibition is accounted for, and is consistent with the whole instrument.[1]

Attention should be called in passing to the fact that Taney's opinion in the License Cases characterizes the power to regulate commerce as a part of the general police powers of the states. Taney says:

But what are the police powers of a state? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a state passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the Constitution of the United States. And when the validity of a state law making regulations of commerce is drawn into question in a judicial tribunal, the

[1] 5 How. at 579.

authority to pass it can not be made to depend upon the motives that may be supposed to have influenced the Legislature, nor can the court inquire whether it was intended to guard the citizens of the state from pestilence and disease, or to make regulations of commerce for the interests and convenience of trade.[1]

The position thus taken by Taney differs essentially from Marshall's view that the same measures may flow from distinct powers, and that commerce among the states is not regulated even when it is substantially affected by state laws passed for local purposes.[2]

The opposing view that the federal power to regulate interstate and foreign commerce was exclusive still persisted in the minds of members of the Court as appears in the opinions in the *Passenger Cases,* decided in 1849.[3] Here the issue involved the validity of Massachusetts and New York statutes taxing immigrants entering their ports. The revenue to be derived therefrom was for purposes concededly within the powers of the state, in the case of Massachusetts being for the support of alien paupers, and in the case of New York for the maintenance of its public health service. As in the *License Cases,* the *Passenger Cases* contain no single opinion presenting the view of a majority of the Court. The legislation was held invalid by a vote of five to four; five opinions favoring this result were written, and three opinions dissenting therefrom, Mr. Justice Nelson, who concurred with Taney's dissent, being the only member of the Court who refrained from writing. Again no attempt will be made to deduce the authority of the Court for anything but the result. Neither those concurring in nor dissenting from the result needed to commit themselves on the question whether

[1] 5 How. at 583.

[2] See pp. 81, 82, *supra.*

[3] 7 How. 283.

the power of Congress was exclusive. The majority could have based their decision solely on conflicting treaties and laws of the United States which, of course, take precedence over state laws. The minority could have evaded the issue by holding that the taxes were not "regulations" of commerce. The members of the Court, however, quite freely expressed their views on the broader question of the effect of the federal commerce clause on state power. Three of the Justices, either in their own opinions or by concurrence with other opinions, asserted that the power of Congress to regulate commerce was exclusive of state action;[1] four supported the opposite view.[2]

A compromise between these two conflicting views was reached in 1851 in *Cooley* v. *Board of Wardens*.[3] Here a Pennsylvania statute established rules for the employment of pilots on vessels arriving at or departing from Philadelphia. The issue could no longer be evaded; the statute was clearly a regulation of commerce and did not conflict with any federal laws. The Court sustained the Pennsylvania statute, thereby rejecting the view that state power to regulate interstate and foreign commerce was totally destroyed by the Constitution. The compromise lay in the division of the field of commercial regulation between subjects demanding a single uniform rule throughout the nation, and subjects permitting diversity of regulation. Over the former the power of Congress was declared to be exclusive, while over the latter the states could exercise control provided that their action did not conflict with actual federal legislation. Thus the doctrine of exclusive federal power to regulate interstate and foreign commerce was neither absolutely affirmed nor absolutely denied. The existence of similar power in the states was

[1] McLean, Wayne, McKinley.

[2] Taney, Daniel, Nelson, Woodbury.

[3] 12 How. 299.

made to depend, not upon the nature of the power itself, but upon the nature of the subjects over which it was exercised. The distinction made in this case still prevails and is of the utmost importance in subsequent constitutional interpretation. Perhaps the best statement of this view is that made by Mr. Justice Field in *County of Mobile* v. *Kimball,* sustaining the power of the state to improve the harbor of Mobile and issue bonds for that purpose.

> . . . The subjects, indeed, upon which Congress can act under this [the commerce] power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the states; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the states which consists in the transportation, purchase, sale and exchange of commodities. Here there can of necessity be only one system or plan of regulations, and that Congress alone can prescribe. Its non-action in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free. There would otherwise be no security against conflicting regulations of different states, each discriminating in favor of its own products and citizens, and against the products and citizens of other states. And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the states was to insure uniformity of regulation against conflicting and discriminating state legislation.
>
> Of the class of subjects local in their nature, or intended as mere aids to commerce, which are best provided for by special regulations, may be mentioned harbor pilotage, buoys and beacons to guide mariners to the proper channel in which to direct their vessels. . . .

The uniformity of commercial regulations, which the grant to Congress was designed to secure against conflicting state provisions, was necessarily intended only for cases where such uniformity is practicable. Where from the nature of the subject or the sphere of its operation the case is local and limited, special regulations adapted to the immediate locality could only have been contemplated. State action upon such subjects can constitute no interference with the commercial power of Congress, for when that acts the state authority is superseded. Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the states and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time being, and until it sees fit to act, they may be regulated by state authority.[1]

The question then arises who shall determine whether a subject requires a uniform system or plan of regulations which Congress alone can prescribe. Three different situations may be presented: first, where Congress has declared the necessity of uniform regulation by enacting such regulation; second, where Congress has remained silent; and third, where Congress has declared that the subject permits of a diversity of regulation by the states. In the first situation, the judgment and discretion of Congress is accepted by the Supreme Court if in fact the subject of regulation can be characterized as interstate commerce. The necessity of uniform regulation is not questioned by the Court; its position is that Congress has comprehensive power to regulate interstate commerce, which power is assumed to embrace the right to declare that a particular subject of such commerce shall receive a uniform system or rule of regulation. In the second situation where Congress has given no indication of its views as to the necessity of uniform regulation, the Court

[1] (1881), 102 U. S. 691, 697, 698, 699.

without hesitation exercises its own judgment as to whether such uniformity is demanded. It has been pointed out, that in so doing the action of the Court is legislative, rather than judicial, as it involves the determination of a matter of legislative policy.[1] It is difficult to refute this charge; it is equally difficult to point out any satisfactory alternative. Unless the Court is willing to assume the responsibility of passing judgment on the need of uniformity, it must either deny all state power to regulate subjects of interstate commerce not regulated by Congress, or must impose upon Congress the burden of expressly prohibiting state regulation of a multiplicity of commercial subjects which in the judgment of Congress should be free from state interference. Neither of these alternatives is acceptable. The third situation, a declaration by Congress that a subject permits a diversity of regulation by the states, has not often arisen. This presents a difficulty when the Supreme Court believes that such a subject requires uniformity of regulation, particularly if it has previously refused to sustain the exercise of state power on this ground. To sustain federal legislation permitting diversity of regulation by the states under these circumstances allows Congress to change the effect of the Constitution upon state powers. It may be argued that this is, in substance, an amendment of the Constitution for which state ratification is required. On the other hand, to hold such federal legislation unconstitutional seems to deprive Congress of its constitutional power to determine matters of legislative discretion, unless the need for uniformity of regulation is so manifest as to place the question beyond the proper bounds of legislative discretion. In the period now under consideration this third situation was presented in the Philadelphia pilotage case,[2] where a federal statute had declared that pilots should

[1] Prentice, E. P., *Federal Power over Carriers and Corporations* (New York, 1907), p. 119.

[2] *Cooley* v. *Board of Wardens* (1851), 12 How. 299.

continue to be regulated in conformity with existing or future laws of the respective states. While the Court conceded to this declaration "an appropriate and important signification" and upheld state regulation, the entire tenor of the opinion is such as to indicate that the declaration of Congress would not have been accepted as conclusive, if in the judgment of the Court pilotage had required uniformity of regulation.[1]

In determining what subjects require uniformity of regulation, the Supreme Court can apply no definite legal test and must act entirely at its discretion in the light of the various national and local needs involved in each case. This is what gives the decisions a distinctly legislative flavor. During the period ending in 1887, the Court stated several times without qualification that the transportation of passengers and merchandise from one state to another admits of but one uniform system of regulation and is of such a nature as to require exclusive legislation by Congress.[2] But in one of the cases in which this rule was stated, it was conceded that interstate ferries could be more advantageously managed by the states, and that the privilege of keeping such a ferry is a franchise, grantable by the state, and subject to state regulation.[3] This case applied the rule that transportation is a subject over which the power of Congress is exclusive to invalidate a state tax on the business of operating such a ferry. The same rule, however, would seem to forbid a state to grant or with-

[1] In 1917 the Court sustained the Webb-Kenyon Act of 1913 (37 Stat. L. 699) which made the legality of interstate shipments of intoxicating liquors depend upon the laws of the states to which they were consigned. See pp. 148-153, *infra*.

[2] *Case of the State Freight Tax* (1873), 15 Wall. 232, 279; *Welton* v. *Missouri* (1876), 91 U. S. 275, 280; *County of Mobile* v. *Kimball* (1881), 102 U. S. 691, 697; *Gloucester Ferry Co.* v. *Pennsylvania* (1885), 114 U. S. 196, 204; *Wabash, St. L. & P. Ry.* v. *Illinois* (1886), 118 U. S. 557, 574.

[3] *Gloucester Ferry Co.* v. *Pennsylvania, supra*, at 217.

hold the privilege of operating a ferry from its shore, and to prescribe conditions for the enjoyment of such a privilege. The recognition of state right to regulate interstate transportation by ferry is, therefore, a clear exception to the rule that interstate transportation is a subject requiring uniform and exclusive regulation by Congress. It is an exception based upon the continuous exercise of this power by the states from a period antedating the Constitution,[1] and sustained by a Supreme Court decision enjoining the operation of an interstate ferry in competition with the holder of an exclusive franchise granted by the state.[2] Another subject which the Court declared to admit only of a uniform system of regulation under congressional control is the purchase, sale and exchange of commodities in interstate and foreign commerce.[3] On the other hand, harbor regulation,[4] harbor improvement,[5] quarantine regulations,[6] and the construction of intrastate bridges over navigable waters of the United States [7] were, during the period here considered, declared by the Court to admit of a diversity of local control within the reserved powers of the state.

We have thus seen that in the gradual evolution of the conceptions of exclusive federal jurisdiction and concurrent

[1] See Prentice, E. P., *The Federal Power over Carriers and Corporations* (New York, 1907), pp. 64, 93.

[2] *Conway* v. *Taylor's Executor* (1862), 1 Black 603.

[3] *Welton* v. *Missouri* (1876), 91 U. S. 275; *County of Mobile* v. *Kimball* (1881), 102 U. S. 691, 696. The Court has had much difficulty in determining when goods brought from outside the state lose their interstate character so as to make this rule inapplicable to subsequent sales. The long line of decisions on this question is beyond the scope of the present discussion which is concerned, not with sale and exchange, but with transportation.

[4] *Cooley* v. *Board of Wardens* (1851), 12 How. 299.

[5] *County of Mobile* v. *Kimball, supra.*

[6] *Morgan's S. S. Co.* v. *Louisiana Board of Health* (1886), 118 U. S. 455.

[7] *Gilman* v. *Philadelphia* (1866), 3 Wall. 713.

state jurisdiction over interstate commerce, the Supreme Court, prior to the Interstate Commerce Act of 1887, had committed itself to the rule that that part of interstate commerce which consists in the transportation of passengers and merchandise across state lines is a subject requiring the exclusive regulation of Congress. At first glance, this would seem to mean that the states must absolutely keep their hands off interstate transportation. Such a sweeping destruction of state power was not contemplated by the Court. In the first place, it is an empirical rule which is stated, and as such it is subject to exceptions, as in the case of transportation by ferry. In the second place, this rule is easily evaded by the convenient doctrine that the states may interfere to some extent with interstate transportation provided that their action escapes the damning epithets of "burden" or "regulation" and can be more innocuously described as "incidentally affecting interstate commerce". With these two open avenues of escape from the rule of exclusive congressional control, it fails to solve the problem of state contracts with interstate transportation. Therefore, it becomes necessary to review specific decisions, including several to which previous reference has been made, with the particular purpose of learning when the Court applied this rule to prohibit state action affecting interstate transportation and when it did not.

State action under the police power in its broader meaning will be considered first. The Court has always been impressed with the necessity of sustaining the reserved power of each state to protect the health, safety, morals and general welfare of its own citizens and of others within its territory. In so doing, the states could scarcely avoid contact with interstate transportation. Some of these contacts are frankly admitted by the Court to be regulations of interstate commerce, but are justified on the ground that the subject of regulation admits of diverse rules of regulation in different

localities. We have already seen that for this reason the Court sustained state legislation regulating pilotage, imposing quarantine rules, providing for harbor improvements, authorizing the construction of bridges across navigable streams and granting exclusive franchises for interstate ferries.[1] To the extent that the Court admits that such legislation regulates interstate commerce, it must be conceded that it is making exceptions to the rule that interstate transportation admits only of regulation by Congress, because the particular part of interstate commerce which is affected by such regulations is the transportation of persons and property. But in other cases the Court deemed that the contact of state legislation with interstate transportation was not a burden on or regulation of that subject. These were cases where the local needs for state action were strong and the effect upon interstate transportation was slight. In this category may be placed *Willson* v. *Black Bird Creek Marsh Company* in which we have seen that the Court through Mr. Chief Justice Marshall said that a state did not regulate interstate commerce by authorizing the construction of a dam across a navigable stream, to protect local health and property interests, the navigation obstructed by the dam being relatively unimportant.[2] In several other cases decided in this period, state action affecting interstate transportation was held not to be a regulation thereof. Thus state legislation was sustained which regulated charges for services incidental to interstate transportation such as the storage of grain in warehouses.[3] Similarly an act, establishing the rules for liability for death resulting from negligence in interstate transportation, was held to be within the reserved powers of the state.[4] In the

[1] See p. 90, *supra*.

[2] (1829), 2 Peters 245. See p. 81, *supra*.

[3] *Munn* v. *Illinois* (1877), 94 U. S. 113.

[4] *Sherlock* v. *Alling* (1876), 93 U. S. 99.

Railroad Commission Cases, decided in 1886, the Court sustained a Mississippi statute establishing a commission empowered to enforce various police regulations against railroads engaged in interstate transportation.[1] The forms of state regulation approved in this decision which affected the interstate as well as the intrastate business of the railroads included provisions requiring the railroads to file and post tariffs of transportation charges, to conform to such tariffs without discrimination, to furnish financial statements and other information relative to the management of their lines, to report accidents involving serious personal injuries, to provide adequate waiting rooms, and to maintain train bulletin boards at all stations, none of which were considered regulations of interstate commerce. On the other hand, a Louisiana statute requiring the operators of public conveyances to give to all persons traveling in that state equal rights and privileges in all parts of the conveyance without discrimination on account of race or color was held invalid in *Hall* v. *De Cuir* (1878) as applied to the transportation of a colored woman between points in Louisiana on a steamboat which was also engaged in interstate transportation.[2] The particular regulation considered in *Hall* v. *De Cuir* was a more serious burden upon the interstate business of the carrier than those sustained in the *Railroad Commission Cases* because, to quote from the opinion, "it must necessarily influence his conduct to some extent throughout his entire voyage".[3]

It took the Supreme Court some time to reach a clean-cut decision denying the power of a state to regulate charges for transportation between points within and points outside of the state. In fact, it was this decision made in 1886 in

[1] 116 U. S. 307.

[2] 95 U. S. 485.

[3] *Ibid.* at 489.

Wabash, St. Louis and Pacific Railway v. *Illinois,*[1] which marks the termination of the period now under consideration by throwing upon Congress the burden of protecting the shipping and traveling public from unreasonable and discriminatory charges for interstate transportation. The Court had an opportunity to establish this rule in the granger cases in 1877.[2] Part of the state legislation involved in these cases was attacked on the ground that it sought to regulate interstate rates in violation of the commerce clause of the United States Constitution. No attempt was made to regulate transportation crossing the state, but the statutes clearly applied to interstate movements commencing or terminating in the state. As to such movements, Chief Justice Waite said:

> Until Congress acts in reference to the relations of this company to interstate commerce, it is certainly within the power of Wisconsin to regulate its fares, &c., so far as they are of domestic concern. With the people of Wisconsin this company has domestic relations. Incidentally, these may reach beyond the state. But certainly, until Congress undertakes to legislate for those who are without the state, Wisconsin may provide for those within, even though it may indirectly affect those without.[3]

While the legislation under consideration in the *Railroad Commission Cases* [4] gave the Mississippi commission similar power to regulate interstate rates, the power had not been exercised by the commission when the cases were decided. The Court was then very evidently in doubt as to the validity of this feature of the commission's power, and evaded the issue

[1] 118 U. S. 557.

[2] *Chicago, B. & Q. R. R.* v. *Iowa*, 94 U. S. 155; *Peik* v. *Chicago & N. W. Ry.*, 94 U. S. 164.

[3] 94 U. S. at 178.

[4] (1886), 116 U. S. 307.

by saying in substance that it would be time enough to consider it when the commission attempted to go beyond the limits of its constitutional authority.[1] The *Wabash* case, decided a few months later, compelled the Court to take a definite stand against state regulation of interstate rates.[2] In that case the state of Illinois sought to impose a statutory penalty against the defendant railroad company for unjust discrimination because its charges on a shipment from Gilman, Illinois, to New York City exceeded the amount of its charges for like transportation for a greater distance on the same road. This, by the provisions of the state statute, was *prima facie* evidence of unjust discrimination. It was conceded that such a statute would have been valid if it had applied only to shipments which did not leave the state, but the Court held that the Illinois statute was unconstitutional because it attempted to regulate the fares and charges by railroad companies within the limits of the state for a transportation which constituted a part of commerce among the states. The case clearly overruled the decisions in the granger cases in so far as they sustained the power of the states to fix rates for interstate transportation by statute. Mr. Justice Miller in the *Wabash* opinion attempted to explain the discrepancy between these decisions by pointing out that the great question in the granger cases was the right of the state to regulate or limit the amount of any railroad traffic charges, and that little attention was given to the question whether this right extended to charges for interstate transportation.[3] The *Wabash* case established beyond dispute that the reserved police powers of the states do not include the power to establish or limit charges for interstate transportation by railroad, and that state statutes attempting to do so are uncon-

[1] (1886), 116 U. S. at 335.

[2] (1886), 118 U. S. 557.

[3] *Ibid.* at 566-570.

stitutional as regulations of a subject of interstate commerce requiring a uniform national rule which may be prescribed only by Congress.

We pass now to another form of state action affecting interstate transportation which is on the borderline between the police power and the taxing power. The state in the exercise of its unquestioned reserved police powers may grant to interstate carriers the use of various privileges and facilities. Among these are the privileges of incorporation, of acquiring property by eminent domain, and of using or crossing public works constructed by the state or under its authority such as roads, canals and docks. For these privileges the state exacts compensation in different forms. To the extent that this compensation is merely a reasonable equivalent of the expense incurred by the state in furnishing the privileges and facilities, the power of the state is conceded. To this extent the amount paid by the carrier is no more a burden on interstate transportation than any other expense necessarily incurred in furnishing transportation, and is in no proper sense a tax. If the state as the owner and proprietor of its public works imposes a charge for their use in interstate transportation which does not exceed their rental value, it can scarcely be characterized as a tax even if it results in a substantial profit to the state. The burden is of the same character as that resulting from rentals paid for the use of privately owned property, and should be regarded as a necessary expense of transportation. To permit the use of these facilities at less than their rental value would confer a special privilege upon the user since the supply of these privileges is limited. But when the state uses its power to grant or withhold such privileges as incorporation, eminent domain or permission to transact business within its borders as a means to add to its general revenues, then the state action closely resembles the exercise of its taxing power and a real burden

may be imposed upon interstate transportation by the exaction of exorbitant charges. The exaction of more than cost for the grant of these privileges can not be justified as rental because there is no limit to the state's capacity to confer them. Yet charges for such privileges imposed by the states have been sustained by the United States Supreme Court, which has regarded them as proper compensation for state-granted privileges and has expressly stated that they were not burdens on or regulations of interstate commerce in violation of the commerce clause. The Court declared in 1875 that "the state has an undoubted power to exact a bonus for the grant of a franchise, payable in advance or *in futuro*," and accordingly sustained a provision in the Maryland charter of the Baltimore and Ohio Railroad requiring that company to pay to the state one-fifth of the gross passenger receipts from its road between Baltimore and Washington as a proper bonus for the grant of a corporate charter to construct and operate a railroad between those points.[1] The Court recognized the difficulty of drawing the line between the state's right to control corporations of its own creation and the prohibitions of the Constitution against regulating or impeding interstate commerce, but held that an exaction of a percentage of gross receipts from interstate transportation by charter provisions was not a regulation of interstate commerce. To this extent the Maryland charter case is still law.

But the Court's reasoning in this case goes much farther than the actual decision. Proceeding from the premise that the state has undisputed power to construct and operate roads, canals, and railroads, and to make whatever charges it sees fit for their use, the Court argued that the state could authorize its citizens or corporations to do the same, and in granting such a franchise could still retain absolute control of the

[1] *Baltimore and Ohio R. R.* v. *Maryland* (1875), 21 Wall. 456.

amount and disposition of the charges for transportation. This argument carried to its logical conclusion would mean that the state, in the absence of conflicting legislation by Congress, could regulate the charges to be made by interstate carriers as a consideration for and condition of its grant of franchises. In accordance with this reasoning the Court said ten years after the Maryland charter decision that "the privilege of keeping a ferry, with a right to take toll for passengers and freight, is a franchise grantable by the state, to be exercised within such limits and under such regulations as may be required for the safety, comfort and convenience of the public".[1] It is an interesting speculation whether the Court would have applied the same reasoning to provisions in state franchises limiting the charges for interstate transportation by railroads. If, for example, in the *Wabash* case[2] Illinois had sought to enforce a franchise provision instead of a statutory penalty, would the Court have said in the words of the *Maryland* decision[3] that "in view of the very plenary powers which a state has always been conceded to have over its franchises and its corporations, we can not regard the stipulation in question as amounting to a regulation of commerce between the states"? I greatly doubt it. The Court in the *Wabash* decision was so insistent upon the necessity of interstate transportation being free from the restraint of a multitude of diverse rules, that it would scarcely have opened the door to the very situation it condemned so severely by recognizing the power of the states to regulate interstate railroad rates by franchise provisions. Such a power could be exercised at any time under the almost universal provisions of state constitutions and state laws reserving the right to alter or repeal the charters of their corporations. It is a

[1] *Gloucester Ferry Co.* v. *Pennsylvania* (1885), 114 U. S. 196, 217.

[2] See p. 95, *supra*.

[3] (1875), 21 Wall. 473.

question to which we can not obtain a definite answer, because Congress in 1887 affirmatively exercised its power to regulate rates for interstate transportation, and its legislation on this subject as the supreme law of the land, clearly supersedes the provisions of state franchises, even if they could be sustained in the absence of federal legislation.

The state in the exercise of its police power may do much to facilitate the movement of interstate commerce. It may improve navigation by the removal of rocks and the construction of dams and canals. It may promote the freedom and safety of transportation by measures such as harbor regulations and inspection laws. It may appoint officers to enforce such regulations and impose penalties for their violation. All such action involves expense to the state for which compensation may be exacted from the users of the facilities.[1] This principle clearly supports the imposition of reasonable state license fees for vehicles used in interstate transportation to cover the expense incurred by the state in enforcing local police regulations concerning the inspection and operation of such vehicles, and providing facilities for their movement. The bounds of reasonable compensation would seem to be exceeded by a state license fee of $100 per annum for every ferry boat operated within its territory, yet the Supreme Court not only sustained such a license fee as applied to interstate ferry boats in *Wiggins Ferry Co.* v. *St. Louis*,[2] but also declared that it was not a regulation of commerce. It is somewhat difficult, in view of the amount of the fee, to reconcile this decision with the ruling three years later that state taxation of interstate transportation by ferry is an invasion of the exclusive power of Congress.[3]

[1] See *Gloucester Ferry Co.* v. *Pennsylvania* (1885), 114 U. S. 196, 214; Hall, *Cases on Constitutional Law* (1913), notes, pp. 1101, 1102.

[2] (1883), 107 U. S. 365.

[3] See *Gloucester Ferry Co.* v. *Pennsylvania* (1885), *supra*.

It must be remembered that the various manifestations of the reserved police power of the state which were sustained in the decisions just reviewed are subject and subordinate to the superior power of Congress to regulate commerce between the states. These decisions do not mean that the states may exercise the powers sustained in them irrespective of the action of Congress, but only in the absence of conflicting federal regulation. Under the clause of the United States Constitution making the Constitution and laws of the United States the supreme law of the land, the reserved police power of the states must bow to Congressional legislation enacted pursuant to the power of regulating commerce between the states.[1]

We turn now to United States Supreme Court decisions concerning the extent to which the states may affect interstate transportation by the exercise of the reserved power of taxation. It has already been pointed out that some state legislation which in its effect can scarcely be distinguished from taxation was sustained under the police power as compensation for privileges granted by the state. The decisions now to be considered relate to acts which are characterized by the Court as taxation. The taxing power of the states, absolutely essential to the continued existence of their governments, would be seriously crippled if no contact whatever with interstate transportation were permitted. Yet, if unrestrained, it could easily be exercised in such a way as to cause serious interference with the federal power to regulate commerce and with the free movement of commerce between the states. The Supreme Court, therefore, has established two general principles to which the exercise of state taxing power must conform in its relation to interstate transportation. The first of these principles to be discussed is that "the states have no power, by taxation or otherwise, to re-

[1] *Gloucester Ferry Co.* v. *Pennsylvania, supra,* at 215.

tard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government ".[1] The second is that " all restraints by exactions in the form of taxes upon [interstate] transportation, or upon acts necessary to its completion, are so many invasions of the exclusive power of Congress to regulate that portion of commerce between the states " and are, therefore, unconstitutional.[2]

The principle that the states must not interfere with the operations of the laws of the United States was enunciated in 1819 in connection with the attempt of the state of Maryland to tax the issue of notes by the Bank of the United States.[3] The Bank, incorporated by Congress and acting as an agency of the federal government in carrying into execution its fiscal powers, was held to be exempt from state taxation imposed upon its authorized acts. In thus invalidating the Maryland tax upon the note issue of the Bank, the Court laid down the rule that not only the operations of the United States government itself, but also of other agencies employed by it to carry into execution its constitutional powers, are exempt from state taxation. Upon the same principle, it was decided in 1824 in *Osborn* v. *Bank,* that the state of Ohio could not tax the right of the bank to exist and to transact business within the state.[4] Chief Justice Marshall, however, in the opinion in the *McCulloch* case, limited the decision to a state tax on the *operations* of the bank, and stated that the rule " does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in com-

[1] *McCulloch* v. *Maryland* (1819), 4 Wheat. 316, 436.

[2] *Gloucester Ferry Co.* v. *Pennsylvania* (1885), 114 U. S. 196, 214.

[3] *McCulloch* v. *Maryland, supra.*

[4] 9 Wheat. 738.

mon with other property of the same description throughout the state ".[1] In the *Osborn* case also, it was expressly stated that the decision did not apply to a state tax upon the local property of the bank.[2]

This distinction between a tax on the property of a governmental agent and a tax upon the action of such agent, or its right to do business, was recognized by the Court in two decisions arising from attempts of corporations constituting parts of the Pacific Railroad system, established under Congressional authority, to escape state property taxation.[3] In the earlier of these cases, the railroad company taxed was a corporation created by the state imposing the tax but claimed exemption upon the ground that it was a part of a railroad system constructed by authority of Congress for the use of the United States government. The tax was sustained. The later case, *Union Pacific Railroad* v. *Peniston,* decided in 1873, presented stronger grounds for holding the tax unconstitutional because the railroad company owed its corporate existence to an act of Congress and the power of the state to tax corporations of its own creation could not be asserted. The question was, therefore, squarely raised whether a state could tax property within its borders which was owned by a corporation created by the laws of the United States for the purpose of carrying into execution the constitutional powers of Congress, and which was used by the corporation in the performance of the obligations imposed upon it by federal law. It was held that such a tax did not result in unwarranted interference with the operations of the laws of the United States. The Court frankly recognized that the principle of the *McCulloch* case could not be carried

[1] 4 Wheat. 436.

[2] 9 Wheat. 738, 867.

[3] *Thomson* v. *Pacific Railroad* (1870), 9 Wall. 579; *Union Pacific R. R.* v. *Peniston* (1873), 18 Wall. 5.

to the extent of prohibiting a state tax which remotely affects the exercise of federal power. To do so would destroy state power to tax persons or property to such an extent that the state governments could not exist. It, therefore, insisted upon giving the Constitution a practical interpretation based upon the effect of the tax;

> That is, upon the question whether the tax does in truth deprive them [federal agencies] of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of federal powers.[1]

The opinion makes it clear that any tax upon the franchises or right of such companies to exist and perform the functions for which they were created or upon any act which they were authorized to do, would be regarded as a tax upon their operations and, therefore, an unconstitutional interference with the execution of federal powers.

The recognized power of the states to tax property owned by agencies of the United States and used in the execution of federal laws, does not extend to the property of the United States government itself, and " no state can tax the property of the United States without their consent ".[2] It is difficult to distinguish in principle between state taxes upon the property of the United States and upon the property of its agencies so far as their effect upon the exercise of federal powers is concerned. In either case the tax diminishes *pro tanto* the fund available for the execution of the laws of the United States.

The cases just discussed arose in connection with agencies

[1] (1873), 18 Wall. at 36.

[2] *Van Brocklin* v. *Tennessee* (1886), 117 U. S. 151.

created by Congress, or acting under its authority, in the exercise of its fiscal, military and postal powers. The same principle, however, should be applicable to the same extent to corporations or other agencies created and employed by the United States under the commerce power, in the event that a policy of federal incorporation of interstate railroads should be adopted. Such federal corporations would undoubtedly be held exempt from state taxation of their corporate franchises, or their right to engage in the business of interstate transportation, and of their acts and operations under their federal charter, but their property would be subject to state property taxes.

The principle that a state must not tax interstate transportation or acts necessary to its completion raises at once the question: what is a tax on transportation? The line of reasoning is that a tax is a regulation, that Congress alone may impose regulations upon that part of interstate commerce which requires uniformity of regulation, that interstate transportation does require such uniformity, and that, therefore, the states may not impose taxes upon interstate transportation. Here again we are faced with the necessity of giving a practical interpretation to the Constitution which will not cripple state power to tax persons and property. The fact that so many forms of taxation may affect interstate transportation to some degree has made it necessary for the Court to refrain from holding that every tax which even remotely affects interstate transportation is a tax upon that subject, and hence an unconstitutional regulation thereof. It has had recourse to the now familiar and somewhat vague distinction between acts which are a "regulation" or "burden" upon transportation and acts which only incidentally affect it.

It has already been shown that the Court decided in the *Peniston* case that a state property tax was not an uncon-

stitutional burden upon or interference with the execution of federal powers by agencies created for that purpose.[1] Clearly no stronger reasons exist for considering a state property tax to be an interference with interstate commerce, than for considering it to be an interference with the operations of federal agencies. Therefore, the Court gave its approval to taxes imposed by the states upon property within their borders used for interstate transportation. Mr. Justice Strong, who wrote the opinion in the *Peniston* case, remarked in another opinion written a short time before:

> So it must be admitted that a tax upon any article of personal property, that may become a subject of commerce, or upon any instrument of commerce, affects commerce itself. . . . Still it is not a tax upon transportation, or upon commerce, and it has never been seriously doubted that such a tax may be laid.[2]

In two other cases decided near the end of the period under consideration, the Court stated that a tax upon property used in transportation within the jurisdiction of the state is not a tax upon transportation and, therefore, is not invalid even where interstate commerce is involved, where no discrimination is made against interstate commerce.[2] This rule has become settled law.

On the other hand, the Court consistently has refused to sustain a state tax levied upon passengers or freight transported in interstate or foreign commerce because of such transportation. Such a tax is regarded as a tax upon and regulation of transportation, and in violation of the exclusive

[1] See p. 102, *supra*.

[2] *State Tax on Railway Gross Receipts* (1873), 15 Wall. 284, 294. The Court subsequently overruled the decision in this case (*Philadelphia & S. M. S. S. Co.* v. *Pennsylvania* (1887), 122 U. S. 326), but the passage quoted has not been discredited.

[3] *Gloucester Ferry Co.* v. *Pennsylvania* (1885), 114 U. S. 196, 206; *Philadelphia & S. M. S. S. Co.* v. *Pennsylvania, supra.*

power of Congress over that particular part of interstate and foreign commerce. This was one of the reasons advanced by members of the Court in the *Passenger Cases* (1849),[1] for denying the power of New York and Massachusetts to impose a head tax on alien passengers landing in their ports. Owing to the confusion of opinions in the *Passenger Cases,* they can scarcely be regarded as authoritative in establishing general rules of constitutional interpretation, but all doubt upon this particular point was removed by a group of cases decided in 1876.[2] In these cases the Court decided that a state tax on passengers, collected from them, or on a vessel or its owners for the exercise of the right of landing passengers, is void because it is a regulation of the transportation of passengers, a subject confided exclusively to the discretion of Congress. Similarly, the Court in *Case of the State Freight Tax* (1873), held that a Pennsylvania statute was unconstitutional which provided that every company doing business in Pennsylvania on whose works freight may be transported, with certain exceptions, should pay a tax at specified rates on each ton of freight carried over, through, or upon its works within the state, that freight carried over different but continuous lines should be taxed but once, and that the companies were authorized to add the tax to the amount of their tolls or charges.[3] This statute is described in considerable detail because the Court laid stress upon these details in finding that the burden of the tax was intended to rest upon the freight transported because of its transportation, and not upon the business of the transportation companies as such. It, therefore, had no hesitation in declaring this particular measure to be a tax upon, and therefore regu-

[1] 7 How. 283. See pp. 84, 85, *supra.*

[2] *Henderson* v. *Mayor of the City of New York,* 92 U. S. 259; *Chy Lung* v. *Freeman,* 92 U. S. 275.

[3] 15 Wall. 232.

lation of, interstate transportation since it applied to all freight, including interstate shipments, moving within the state.

This distinction between a tax upon the freight transported and a tax upon the business of the carriers proved very troublesome in connection with the taxation of corporations. In the case of corporations created by the taxing state, the Court was at first disposed to permit the state to impose a burden upon interstate transportation by taxing the gross receipts derived therefrom. The basis for upholding such taxation was found in the recognized power possessed by each state to tax corporate franchises of its own creation, as appears in the decision in *State Tax on Railway Gross Receipts,* in the same term in which the *Case of the State Freight Tax* was decided.[1] This decision upheld a Pennsylvania statute which provided that every railroad, canal and transportation company incorporated under Pennsylvania laws, and not liable to a tax upon income, should pay a tax of three-quarters per cent of its gross receipts in addition to other taxes provided by law. The reasoning of the decision is somewhat confused, but out of this confusion there emerges a definite statement that the states may tax the franchises of corporations created by them, that the tax may be proportioned according to the value of the franchise or the extent of its exercise, and that gross receipts may be a measure either of such value or of such exercise. So regarded the Court was unable to see how such a tax was any more a tax or burden upon transportation than a tax upon the value of other property of the corporation, which, as already pointed out, is held to be within the taxing power of the states.[2] The opinion

[1] (1873), 15 Wall. 284.

[2] The Court also attempted to sustain this tax on the ground that the gross receipts, when taxed, were the property of the corporation, and as such subject to a state property tax. The fallacy of this argument, lying

made no distinction between the franchise to be a corporation with its various attributes such as limited liability, the right to sue and be sued as a corporation, and legal entity separate and distinct from that of its stockholders or members, and the franchise to engage in the business of interstate transportation. It is, therefore, impossible to tell which type of franchise the Court considered to be the subject upon which the gross receipts tax was imposed.

In 1887 another Pennsylvania gross receipts tax was presented to the Court in *Philadelphia and Southern Mail Steamship Company* v. *Pennsylvania*[1] in such a way as to make it clear that the subject taxed was the franchise to engage in the business of transportation. The statute taxed the gross receipts from transportation, not only of Pennsylvania corporations, but also of corporations of other states or countries doing business in Pennsylvania. Since the latter class of corporations did not owe their corporate existence to Pennsylvania, the Court found that the tax could not have been intended to be imposed upon the corporate franchise. It held that as a tax upon the franchise of doing the business of transportation in carrying on interstate and foreign commerce it was unconstitutional, and could not be enforced even against a Pennsylvania corporation. In using the phrase "the franchise of doing business", the Court was perhaps confusing the *right* to do business, which exists without legislative grant, and the *franchise* to do business in a corporate capacity, which is created by legislative grant. The latter, with respect to Pennsylvania corporations, was a corporate franchise granted by the taxing state. To the extent

in the fact that the receipts were taxed, not because of their value as property, but because of the source from which they were derived, was recognized in *Philadelphia & S. M. S. S. Co.* v. *Pennsylvania* (1887), 122 U. S. 326, 341.

[1] 122 U. S. 326.

that the statute taxed this franchise to do business as a corporation created by Pennsylvania, it could have been sustained consistently with the opinion in the *Gross Receipts* case. But the statute in the *Philadelphia Steamship Company* case sought to extend the exercise of the state taxing power to the franchise to do interstate business in a corporate capacity granted by other states. The case is, therefore, technically distinguishable from the *Gross Receipts* case. Nevertheless, the *Philadelphia Steamship Company* case has always been regarded as overruling the *Gross Receipts* case because its reasoning is clearly opposed to sustaining a tax upon gross receipts derived from interstate transportation even if imposed under the guise of a tax on the corporate franchise. The following passages from the opinion may be cited in support of this statement:

> . . . No doubt the capital stock of the former [domestic corporations], regarded as inhabitants of the state, or their property, may be taxed as other corporations and inhabitants are, provided no discrimination be made against them as corporations carrying on foreign or interstate commerce, so as to make the tax, in effect, a tax on such commerce. But their business as carriers in foreign or interstate commerce cannot be taxed by the state, under the plea that they are exercising a franchise.
>
> . . . The corporate franchises, the property, the business, the income of corporations created by a state may undoubtedly be taxed by a state; but, in imposing such taxes, care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the federal government.[2]

This decision makes it clear that a state, in exercising its recognized power to tax the franchise to be a corporation of its own creation, is not free from all restraint but must avoid

[1] 122 U. S. 344, 345.

methods which, in the opinion of the Court, make the tax, in effect, a tax on interstate commerce. A tax varying with gross receipts from interstate transportation violates this principle. The decision left open for future consideration other standards of measurement of taxes upon the corporate franchises, such as the net income of the corporation. The cases more definitely drawing the line between permitted and prohibited forms of taxation of domestic corporations belong to the periods to be considered in subsequent chapters.

As to foreign corporations, by which term is meant any corporation other than those created by the state imposing the tax, the decisions do not present so much difficulty. The Court much more readily found a tax imposed on such corporations to be a tax or burden upon interstate transportation in violation of the commerce clause of the Constitution because the issue could not be clouded by an attempt to justify the tax as within the powers which a state might exercise over corporations of its own creation. The distinction, previously referred to, between a tax on the freight transported and a tax on the business of the transporting company, was never observed with reference to interstate transportation by foreign corporations. Thus in *Gloucester Ferry Co.* v. *Pennsylvania* a state statute taxing every company, domestic and foreign, doing business in the state, except insurance companies and banks, at specified rates upon their entire capital stock was held invalid as applied to a foreign corporation whose only business in Pennsylvania was the interstate transportation of passengers and freight by ferry.[1] The Court could not regard this tax as a tax upon property because it was measured by the entire capital stock of the companies which to a large extent represented property beyond the jurisdiction of the taxing state; nor could the tax be regarded as one imposed upon the franchise to be a corpora-

[1] (1885), 114 U. S. 196.

tion as it made no distinction between domestic and foreign corporations. This left as the only ground for imposing the tax, the fact that the corporation was doing business within the taxing state, and the business being interstate transportation, the tax was held to be an unconstitutional regulation of that subject. In so deciding, the Court said that the freedom of transportation between the states, secured under the commercial power of Congress, "implies exemption from charges other than such as are imposed by way of compensation for the use of property employed, or for facilities afforded for its use, or as ordinary taxes upon the value of the property".[1] A tax on the gross receipts derived by a foreign corporation from interstate transportation was also held to be an unconstitutional burden on such transportation.[2]

In the period considered in this chapter the Supreme Court had only sketched the outlines of its interpretation of the effect of the commerce clause of the Constitution upon the taxing power of the states. In the various opinions on the subject, it is very evident that the Court was seeking to avoid technical considerations and to ascertain the actual practical effect of the various forms of state taxation on which its judgment was required. On the one hand, it sought to protect the essential power of the states to raise the revenues necessary to sustain their governments; on the other hand, it sought to preserve the freedom of commercial intercourse between the states. Whenever the state taxing power came in contact with interstate transportation, the general method of approach was to inquire whether the tax was a tax upon such transportation. If the only possible ground for taxation was the transaction of the business of interstate transportation within the state, then the Court was constrained to

[1] (1885), 114 U. S. 217.

[2] *Fargo* v. *Michigan* (1887), 121 U. S. 230. See also the discussion of *Philadelphia, etc. S. S. Co.* v. *Pennsylvania*, p. 108, *supra*.

find that the tax was in fact levied upon such transportation and, therefore, was an unconstitutional regulation thereof. But where some other basis for taxation could be found, such as the presence of property within the jurisdiction of the state, and the tax was of general character, not discriminating against transportation and equally applicable to those engaged in other occupations, the mere fact that persons and corporations engaged in interstate transportation or property used therein were subject to the tax, did not in the opinion of the Court make it a tax upon interstate transportation. The states, however, under the guise of taxing their own inhabitants and corporations or property within their borders were not permitted to discriminate against interstate transportation or to measure such a tax by the gross receipts therefrom. In such cases the Court disregarded the technical basis of taxation assumed by the states, and found that the taxes were, in fact if not in form, levied upon interstate transportation and, therefore, were unconstitutional regulations thereof.

A brief summary will now be given of the status of judicial interpretation of the Constitution in 1887 as affecting the relations of the states and the nation with respect to the control of interstate carriers. The active exercise of the federal power to regulate such carriers was then but commencing, but the United States Supreme Court had already established a basis for federal regulation by a series of decisions of which the more important have been reviewed in this chapter. The Court had made it clear that the power of Congress to regulate commerce with foreign nations and among the several states is a comprehensive power, without limitation other than those imposed by the express prohibitions of the Constitution and its amendments, to prescribe the conditions on which such commerce in all its forms shall be conducted. It had, therefore, been held that the power of

Congress embraces, not only the sale and exchange of commodities, but commercial intercourse including the transportation of both passengers and merchandise by land as well as by water. The Court's interpretation had also recognized that the power extends to the regulation of the highways and instrumentalities used for transportation including, not only the older means of transportation in vogue when the Constitution was adopted, but also those of later development. The exercise of this power could, in the opinion of the Court, reach interstate and foreign commerce at all points within the borders of the several states; nor did the fact that a highway or instrumentality of transportation was entirely within the territorial jurisdiction of a single state, exempt it from federal control if it was used for interstate transportation. In accordance with these principles, the regulation of all parts of the charges for interstate transportation had been declared to be within the jurisdiction of Congress. Thus, when Congress in 1887 undertook to regulate the affairs of interstate carriers by the Interstate Commerce Act, its power to prescribe the conditions on which interstate transportation should be conducted was held by the Court to be plenary and subject only to express constitutional prohibitions such as those contained in the Fifth Amendment protecting liberty and property.

A foundation of judicial interpretation had also been laid for the fostering and promotion of interstate transportation by congressional legislation which does more than merely prescribe the rules for the conduct of such transportation. As a basis for federal legislation designed to promote interstate commerce, there existed in 1887, not only the long line of decisions based upon the commerce clause, but also a broad interpretation of the power to make all laws necessary and proper for carrying into execution the powers vested by the Constitution in the federal government. This power,

as interpreted in *McCulloch* v. *Maryland* and subsequent decisions, does not stop at legislation absolutely indispensable to the execution of enumerated federal powers, but extends to all appropriate means of carrying them into effect. Thus we have seen that the creation by federal law of corporations to further the execution of the fiscal, military and postal powers had been approved by the Court by decisions of which the reasoning was equally applicable to the commerce power. Similarly, federal regulation of intrastate transactions, if in fact necessary for the protection of interstate transportation, clearly conforms with this interpretation of the "necessary and proper" clause. But the regulation of intrastate commerce as such, and not reasonably appropriate to the execution of other federal powers, had been declared by the Court to be beyond the scope of congressional authority.

The Court's position in 1887 with respect to the power of states to adopt legislation affecting interstate transportation is characterized by a conflict between its view that such transportation is a part of commerce requiring a single and uniform system of regulation to be prescribed only by Congress, and its recognition of the necessity of protecting the powers of the states to protect the health, safety and general welfare of those within their borders and to raise the necessary revenue for the support of their governments. Thus the general rule had been established that state legislation regulating or imposing burdens upon transportation between the states was unconstitutional as an invasion of the exclusive power of Congress to regulate that subject. But this rule was subject to exception with respect to certain particular subjects of regulation which, although clearly embraced in the general conception of transportation, were recognized by the Court to be of such character as to permit or require diversity of regulation appropriate to local conditions. The Court had sustained state legislation, not conflicting with

laws of the United States, regulating such subjects as transportation by interstate ferry, bridges over navigable streams, pilotage, harbor improvements and quarantine. Furthermore, all state legislation affecting interstate transportation was not regarded as a regulation thereof or a burden thereon. In order to avoid undue impairment of the police power of the states, the Court was disposed to balance the local need for the legislation against the effect upon interstate transportation, and where the latter was comparatively insignificant, state legislation would be sustained as merely incidentally affecting interstate commerce without imposing a burden thereon. In this balancing process we find, for example, that the Court finally forbade state regulation of charges for interstate transportation even where the welfare of residents of the state was involved, but permitted the regulation of charges incidental thereto for such services as storage and wharfage. The exaction by the state of reasonable charges for facilities and privileges used by interstate carriers was not regarded as an unconstitutional regulation of interstate commerce. In the field of taxation, the Court sought to protect interstate transportation from the direct burden of state taxation upon transportation as such, but where transportation in common with other occupations was subjected to general state taxation such as a property tax, the Court did not regard the tax as an unconstitutional burden upon interstate commerce.

It must always be remembered that these various forms of state action which had been sustained by the Court as within the reserved powers of the states are subordinate to legislation adopted by Congress under its power to regulate interstate commerce, and are void if in conflict therewith. The Court always recognized that the clause of the Constitution declaring that the laws of the United States made in pursuance thereof shall be the supreme law of the land, gives

such laws precedence over state legislation which, in the absence of conflicting federal laws, would be a valid exercise of state power.

The situation in 1887, therefore, was that the Constitution itself and the judicial interpretation thereof by the United States Supreme Court had firmly entrenched the federal government in a dominant position in the control of interstate carriers. Its power to take any action appropriate to the protection or promotion of interstate commerce was practically unlimited. The scope of state action with respect to such carriers was closely limited by the Court's interpretation of the Constitution itself. Furthermore, the recognized reserved powers of the states were subordinate to federal authority in matters concerning interstate commerce. The fundamental principles of the separation of state and federal power at this time had been established in outline. The specific applications and development of these principles in subsequent years will be the subject of the two following chapters.

CHAPTER III

Judicial Interpretation of Federal and State Powers. 1887-1920

This chapter will consider the judicial interpretation of federal and state power to regulate interstate carriers from 1887 to 1920. The period under consideration began with the enactment of the Interstate Commerce Act of 1887, which was the first attempt of Congress to subject interstate carriers to any considerable degree of federal regulation, and ended with the enactment of the Transportation Act of 1920 which greatly extended the scope of federal intervention in the relations of the states to interstate carriers. This period was characterized by the ever-increasing exercise of federal power over the interstate business of the carriers. It is true that the relations of interstate carriers to the states in matters involving intrastate transportation were frequently affected by federal regulation of their interstate affairs. Nevertheless, the system of regulation throughout this period was essentially dual, and state power over intrastate matters was in general restricted by federal authority only in particular situations having an intimate and direct connection with the interstate business of the carrier. It was in 1920 that Congress definitely asserted its predominance in the general regulation of the intrastate business of carriers engaged in interstate transportation. But during the period considered in this chapter the Court foreshadowed this revolutionary extension of federal control to intrastate transportation by some of its decisions sustaining federal power and restricting state power in the regulation of intrastate transportation.

It has been shown in the preceding chapter that the federal power to regulate commerce between the several states had been very liberally and broadly defined even before the active federal regulation of interstate carriers had commenced. The decisions of the United States Supreme Court in the period now under discussion applied the general principles stated by the Court in the preceding period to specific legislation. The old definitions of the various phrases of the commerce clause were frequently reiterated or restated. It will be recalled that Chief Justice Marshall in *Gibbons* v. *Ogden* took up successively the terms "commerce", "among the several states" and "to regulate", and defined them with great care.[1] Nearly a century later Mr. Justice Van Devanter undertook the same task with the following result:

> 1. The term "commerce" comprehends more than the mere exchange of goods. It embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers, whether carried on by water or by land.
> 2. The phrase "among the several states" marks the distinction, for the purpose of governmental regulation, between commerce which concerns two or more states and commerce which is confined to a single state and does not affect other states,—the power to regulate the former being conferred upon Congress, and the regulation of the latter remaining with the states severally.
> 3. "To regulate", in the sense intended, is to foster, protect, control and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large.[2]

The definitions of "commerce" and "among the several states" given by Van Devanter do not vary in any essential particular from those given by Marshall. It is in dealing

[1] (1824), 9 Wheat. 1. See pp. 62, 63, *supra*.

[2] *Second Employers' Liability Cases* (1912), 223 U. S. 1, 46, 47.

with the phrase "to regulate" that we note a change in judicial interpretation. To Marshall, the power to regulate commerce was the power "to prescribe the rule by which commerce is to be governed"; to Van Devanter it was "to foster, protect, control and restrain". While Marshall's definition would clearly embrace the conceptions of control and restraint, the implications of the words "to foster and protect" seem much broader than those of the words used by Marshall. The power to regulate commerce, conceived as a power to foster and protect commerce, embraces more than the authority specifically granted by the commerce clause as interpreted by Marshall. It practically throws into the commerce clause itself, powers which Marshall would have been compelled to seek in the necessary and proper clause.

But this difference in interpretation is in form rather than in substance. It does not seem likely that the author of the broad interpretation of the "necessary and proper" clause found in *McCulloch* v. *Maryland* [1] would have denied that Congress had power to enact laws designed to foster and protect commerce as well as to establish the rule by which it shall be governed. There may be a distinction between the protection and the regulation of commerce. But unless it is protected, it cannot be regulated. Therefore its protection would seem clearly to fall within Marshall's interpretation of the "necessary and proper" clause as "essential", "requisite" or at least "an appropriate means" to the execution of the power to regulate commerce. Whether we prefer to find the authority to foster and protect commerce in the commerce clause or in the "necessary and proper" clause, is immaterial. The important fact is that the existence in Congress of this power to foster and protect commerce among the several states has been sustained repeatedly by

[1] See pp. 72, 73, *supra*.

the Court. It is thus apparent in discussing the powers of Congress in general terms, that the combined effect of Marshall's interpretations of the commerce clause and the "necessary and proper" clause was to attribute to Congress commercial powers as broad as those indicated by the sweeping definitions used by Mr. Justice Van Devanter.

It is when we leave the realm of generalities and address our attention to the specific applications of these general definitions, that the real expansion of the Court's conception of federal commercial power becomes apparent. Let us first consider the regulation of the carrier's relation to its patrons, that is the terms upon which interstate transportation of passengers or merchandise is rendered. The general power of Congress to regulate the charges for interstate transportation had been so clearly recognized by the Supreme Court prior to the enactment of the Interstate Commerce Act of 1887 [1] that the existence of this power was not seriously questioned thereafter. This power was conceded to include legislation designed to protect individual shippers from the imposition of unreasonable or discriminatory rates. The exercise of federal power, however, was not confined to the protection of individuals; the Interstate Commerce Commission sought to institute radical changes in the rate structure affecting the economic interrelations of various sections and localities, and its authority to take such action was challenged. This led to the decision in *Interstate Commerce Commission* v. *Chicago, Rock Island and Pacific Railway* in 1910 which involved an order of the Commission reducing rates from eastern points to the Missouri River cities such as Kansas City, St. Joseph and Omaha.[2] The order was attacked on the ground that its effect would be to give to the

[1] *Wabash, St. L. & P. Ry.* v. *Illinois* (1886), 118 U. S. 557. See pp. 70, 71, *supra*.

[2] 218 U. S. 88.

jobbers of the Missouri River cities supremacy over the jobbers of the Central Freight Association territory by enabling the former to obtain their merchandise from the East at a lower cost than prior to the order. Notwithstanding this disturbance of pre-existing economic relations, the order was sustained by the Supreme Court as a proper exercise of the power to establish reasonable rates and remove discrimination. The Court, however, indicated that the order would not have been sustained if its purpose had been to establish the economic supremacy of the Missouri River cities. In other words, federal control of interstate rates may be exercised to remove discriminations between localities notwithstanding the resulting change in their economic status, but may not be exercised for the purpose of effecting such change where the previous rate structure is neither unreasonable nor discriminatory. This merely affirms the power to remove rate discrimination between localities and denies the power to establish such discrimination.

Closely connected with the regulation of rates is the regulation of the carriers' liability for loss or damage to shipments. In the absence of federal regulation of this subject, it has been generally held that the establishment of rules of liability arising even from interstate transactions is within the reserved powers of the states.[1] Nevertheless a rule of liability for loss or damage arising in interstate transportation is so clearly a rule by which interstate commerce shall be governed within Marshall's definition of the commerce clause, that it was inevitable that federal regulation of this subject should be sustained. Thus the Carmack Amendment of 1906 [2] making the initial carrier liable to the shipper for loss or damage on any road over which the shipment passes regardless of limitations of liability in the bill of lading

[1] See p. 92, *supra;* p. 164, *infra.*

[2] 34 Stat. L. 584, 595.

was upheld, and where the provisions of federal and state laws concerning liability conflict, the federal rules prevail.[1]

The regulation of the relations between carriers and their shippers and passengers perhaps more clearly falls within even the narrowest definitions of the power to regulate commerce than any other form of regulation in the field of transportation. It is, however, almost equally clear that the federal commerce power embraces the regulation of the physical instrumentalities by which interstate transportation is furnished. We have already seen that, long before Congress exercised control over the physical instrumentalities of land transportation, the Court in the *Daniel Ball* case had sustained federal regulation of navigable streams used in interstate commerce and the vessels navigating those streams.[2] The reasoning of that case was equally applicable to artificial highways of commerce and the vehicles used thereon. It was, therefore, logical and reasonable for the Court to hold that there was no distinction in this respect between water and land or artificial highways of commerce, but that "on the contrary, the same fullness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other".[3] This power "extends incidentally to every instrument and agent by which such commerce is carried on".[4] It embraces not only the commercial highways, such as the roadbed and rails of railroads, but also all the equipment and rolling stock belonging to carriers engaged in interstate commerce.[5] Thus the cars

[1] *Atlantic Coast Line R. R.* v. *Riverside Mills* (1911), 219 U. S. 186; *Adams Express Co.* v. *Croninger* (1913), 226 U. S. 491.

[2] See pp. 67-69, *supra*.

[3] *In re Debs* (1895), 158 U. S. 564, 591.

[4] *Second Employers' Liability Cases* (1912), 223 U. S. 1, 47; *Minnesota Rate Cases* (1913), 230 U. S. 352, 399.

[5] *Interstate Commerce Commission* v. *Illinois Central R. R.* (1910), 215 U. S. 452; *Southern Ry.* v. *United States* (1911), 222 U. S. 20.

of an interstate carrier, used solely for the transportation of its own fuel, were held to be subject to orders of the Interstate Commerce Commission establishing rules for the equitable distribution of coal cars to shippers, notwithstanding the contention of the carriers that these cars were beyond the reach of federal power because they were not used in interstate transportation.[1] The power of Congress to regulate railroad equipment actually used in interstate commerce by requiring the use of various safety devices and imposing and enforcing inspection rules has been sustained.[2] The same power has been held to extend to the regulation of equipment of an interstate carrier used only in intrastate transportation, since the safety of passengers and employees in interstate commerce depends, not only upon the condition of the equipment on which they are riding, but also upon that used in intrastate trains on the same line.[3]

We will now proceed a step beyond the regulation of the terms on which transportation is furnished, and of the physical equipment used in transportation, and direct our attenton to the regulation of the management and affairs of the carriers other than the actual transportation service to the public. In this field the exercise of federal power has been much more vigorously contested. To this the Court applied the principles that commerce in the constitutional sense embraces more than mere shipments and extends to the carriers engaged in interstate commerce, certainly in so far as so engaged,[4] and that Congress has control over interstate carriers "in all matters having such a close and substantial relation to interstate commerce that it is neces-

[1] *Interstate Commerce Commission* v. *Illinois Central R. R., supra.*

[2] *Johnson* v. *Southern Pacific Co.* (1904), 196 U. S. 1.

[3] *Southern Ry.* v. *United States, supra*; *Texas & Pacific Ry.* v. *Rigsby* (1916), 241 U. S. 33.

[4] *Interstate Commerce Commission* v. *Illinois Central R. R.* (1910), 215 U. S. 452, 474.

sary or appropriate to exercise the control for the effective government of that commerce".[1] The Sherman Act of 1890 prohibiting and penalizing "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations"[2] as applied to interstate carriers went distinctly beyond the mere regulation of transportation service as such. It is true that the purpose of its enactment and enforcement, so far as interstate carriers are concerned, was to protect interstate transportation from such increase of charges as might arise from the elimination of competition, and in that sense the Act may be said to be a regulation of transportation service. Interstate transportation, however, could have been protected by a close scrutiny of the rates resulting from agreements between competing carriers, and the application to such rates of the ordinary regulatory procedure designed to prevent unreasonable and discriminatory charges. In enforcing the Sherman Act against carriers the federal authorities did not concern themselves with the reasonableness of the terms upon which transportation service was being rendered by the members of a combination, but merely with the existence of any agreement whereby rates could be fixed by agreement between competitors. In this sense, the exercise of federal power was more than a regulation of transportation as such, but was a regulation of the management of the carriers. This form of federal regulation was sustained by the Supreme Court in 1897 and 1898 by decisions which held that the rate agreements of the Trans-Missouri Freight Association and the Joint Traffic Association were void under the Sherman Act.[3] These

[1] *Houston, E. & W. T. Ry.* v. *United States* (1914), 234 U. S. 342, 355.

[2] 26 Stat. L. 209.

[3] *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290; *United States* v. *Joint Traffic Association*, 171 U. S. 505.

agreements, made between freight associations of competing carriers, provided in substance that the rates in the territory covered by these associations should be established by a committee of the association and observed by all members who did not give immediate written notice of dissent. Even though the rates thus established were reasonable, the agreements were held to be illegal.[1] In *Northern Securities Co.* v. *United States,*[2] decided in 1904, the Court sustained an even greater extension of the exercise of federal power under the Sherman Act by holding that the acquisition by a holding company of stock control of competing carriers was an illegal restraint of trade, and therefore a violation of the act. The holding company was not engaged in interstate commerce, the carriers whose stock it held were parties to no agreement fixing rates, yet the relation of the arrangement to interstate commerce was so close and substantial as to warrant federal interference with the common ownership of the carriers' stock. The decision thus sanctions an exercise of federal control of the affairs of interstate carriers very much beyond the regulation of their transportation service.

The Court also upheld federal regulation of business activities of interstate carriers not embraced in their public function of furnishing transportation for hire. It is true that the transactions so regulated have had a very direct connection with their interstate transportation business which afforded ample justification for federal intervention. Such a decision was made in 1906 when the Court held that the provisions of the Interstate Commerce Act against discrimination were violated by a carrier selling coal to be delivered to the purchaser after an interstate transportation over its

[1] *United States* v. *Trans-Missouri Freight Association, supra; United States* v. *Joint Traffic Association, supra.*

[2] 193 U. S. 197.

own lines at a price insufficient to reimburse the carrier both for the amount it paid for the coal at the mines and for its transportation to the purchaser at its published rates.[1] The Court pointed out that, if this practice were permitted, a carrier could easily avoid its published tariffs by buying and selling many of the commodities moving over its lines and thus defeat the federal legislation against discrimination in rates. The principle of this decision was embodied in the so-called commodities clause of the Hepburn Act of 1906, forbidding the interstate transportation by any railroad company of " any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, *or*[2] which it may own in whole or in part, *or*[2] in which it may have any interest direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier ".[3] It cannot be said that the Court has sustained this enactment in its entirety if its terms are accepted at their full face value. Without definitely declaring that any part of this provision is unconstitutional, the Court, by a very intricate and involved process of interpretation, substantially changed the meaning of the clause. Giving to the word " or " as italicized in the above quotation its usual disjunctive meaning, the clause would appear to prohibit the transportation of articles manufactured, mined or produced by the carrier whether or not it owned and had an interest in them at the time of transportation. Such, however, was not the interpretation of the Court which made the ownership of, or an interest in the commodity at the time of transportation the sole criterion

[1] *New York, N. H. & H. R. R.* v. *Interstate Commerce Commission*, 200 U. S. 361.

[2] Italics mine.

[3] 34 Stat. L. 584.

of illegality, and said that "we should treat the prohibitions as having a common purpose, that is, the dissociation of railroad companies prior to transportation from articles or commodities, whether the association resulted from manufacture, mining, production or ownership, or interest, direct or indirect." [1] It was, therefore, decided that the commodities clause did not prohibit the transportation of coal previously mined by a railroad which it did not own at the time of transportation.[2] In this decision the Court specifically refused to decide the questions whether the federal commerce power embraces authority to control or prohibit the manufacture, mining, production or ownership of an article by a carrier simply because it may become the subject of interstate commerce, and if not, whether this power can impliedly be made to embrace subjects which it does not control, by forbidding a railroad engaged in interstate commerce from carrying lawful articles because at some time prior to transportation it had manufactured, mined, produced or owned them. The refusal of the Court to decide these questions, of course, raised grave doubt concerning the power of Congress thus to regulate the private intrastate activities of interstate carriers. The commodities clause as interpreted, or modified, by the Court was, however, sustained,[3] and federal power to prohibit the interstate transportation of articles owned by the transporting carrier thus received the sanction of the Court. This legislation was upheld as a constitutional exercise of the commerce power intended to cure or prevent the evils of discrimination that might arise, if, in hauling goods, the carrier occupied the dual and inconsistent position of public carrier and public

[1] *United States* v. *Delaware and Hudson Co.* (1909), 213 U. S. 366, 412.

[2] *United States* v. *Delaware and Hudson Co., supra.*

[3] *United States* v. *Delaware and Hudson Co., supra*; *Delaware, L. & W. R. R.* v. *United States* (1913), 231 U. S. 363.

shipper. The principle was thus confirmed that Congress may intervene in the affairs of carriers as dealers in commodities in order to secure the proper performance of their public function of rendering transportation for hire.

The Supreme Court has sustained a large measure of federal control of the management of the relations between interstate carriers and their employees. Federal legislation in this field on which the Court took action during the period under consideration embraced such subjects as liability for injuries, hours of service, and wages, concerning which federal action was upheld, and union affiliations which Congress was not permitted to regulate.

The old common-law rules applicable to the liability of employer to employee for death or injuries arising from negligence made it very difficult for the employee to recover damages because his action could be defeated if his own negligence contributed to the injury, if the accident arose from the negligence of a fellow employee, or if he accepted or continued in employment with knowledge of the risk causing the accident. Federal legislation was enacted modifying or abrogating these three defenses of contributory negligence, negligence of a fellow servant, and assumption of risk in actions arising from the death or injury of employees of interstate carriers.[1] The first act of this character was declared to be unconstitutional because its benefits extended not only to employees actually engaged in interstate commerce at the time of the injury, but to all employees of interstate carriers even if their employment at the time of the injury had no direct relation to interstate commerce.[2] The ground of this decision was, in substance, that one who engages in interstate commerce does not thereby submit all his business to federal regulation, as such a doctrine would

[1] June 11, 1906, 34 Stat. L. 232.

[2] *Employers' Liability Cases* (1908), 207 U. S. 463.

extend the power of Congress to every conceivable subject and destroy the power of the states over matters of purely local concern which have been and must continue under state control. The act was thereupon repassed to conform to the Court's decision by limiting its benefits to those employees engaged in interstate commerce.[1] Federal power to enact such legislation was sustained.[2] The Court found a direct and substantial relation between the act and interstate transportation arising from the tendency of the act to make carriers more careful of the safety of their employees and thus to afford protection from wrong or disadvantageous conditions of service which may prevent or interrupt commerce or make it less expeditious, reliable, economical or secure. The same reasoning would seem to justify federal regulation of liability to employees of interstate carriers engaged in intrastate commerce, because the interstate and intrastate operations are inextricably intermingled and use the same facilities so that wrong or disadvantageous conditions of the one service would necessarily be reflected in the other. This, however, was not the view of the Court.

Federal regulation of the permissible length of the working day of employees of interstate carriers employed in connection with the operation of interstate trains was sustained as embodied in the Hours of Service Act of March 4, 1907.[3] The dangers to passengers, employees and freight arising from the physical and mental inefficiency of employees wearied by excessive hours of service are so obvious that it seems surprising that this exercise of federal power should have been challenged. The ground of attack was that many of the employees to whom the act applied were also engaged

[1] April 22, 1908, 35 Stat. L. 65.

[2] *Second Employers' Liability Cases* (1912), 223 U. S. 1.

[3] 34 Stat. L. 1415; *Baltimore and Ohio R. R.* v. *Interstate Commerce Commission* (1911), 221 U. S. 612.

in intrastate commerce. To this objection the Court replied that, conceding the power of Congress to limit the hours of service in interstate transportation, this power cannot be defeated either by prolonging the period of service through other requirements of the carrier or by the commingling of duties relating to interstate and intrastate operations. The act by its terms does not apply to those employees whose duties never are connected with interstate train movements. Perhaps it was feared that the same view which led to the rejection of the first Employers' Liability Act, would also hold unconstitutional federal regulation of the hours of service of all train-service employees of interstate carriers. The consideration of safety, however, would seem to justify the broadest application of federal power to this subject. A sleepy engineer of an intrastate train could easily cause the death or injury of scores of passengers on an interstate train on the same track.

In the matter of federal power to regulate the affairs of interstate carriers with respect to the labor-union affiliations of their employees, the leading decision of this period, *Adair* v. *United States,*[1] is less liberal than other decisions concerning the relations of carriers and their employees, and is somewhat difficult to reconcile with the general attitude of the Court in other cases. The *Adair* decision held that Section 10 of the Arbitration Act of 1898, making it a criminal offense for a carrier engaged in interstate commerce to discharge an employee because of his membership in a labor union,[2] was unconstitutional. The objection to this legislation was not that it encroached upon the reserved powers of the states, but that it violated the Fifth Amendment because it deprived the carriers of liberty without due process of law by interfering with their freedom to determine whom they

[1] (1908), 208 U. S. 161.

[2] 30 Stat. L. 424.

would employ. Although the exercise of the commerce power is subject to the prohibitions of the Fifth Amendment, the Court gave consideration to and rejected the argument that the interference with liberty was a regulation of interstate commerce authorized by the commerce clause of the Constitution. Since the validity of federal action in commercial matters over which the states also seek to exercise control is usually dependent upon the authority of the commerce clause, a decision interpreting that clause is pertinent to the present discussion. The majority opinion in the *Adair* case, written by Mr. Justice Harlan, was explicit in finding that the legislation was not embraced within the federal commerce power:

> Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the states, must have some real or substantial relation to or connection with the commerce regulated. But what possible legal or logical connection is there between an employee's membership in a labor organization and the carrying on of interstate commerce? Such relation to a labor organization can not have, *in itself* and in the eye of the law, any bearing upon the commerce with which the employee is connected by his labor and his services.[1]

Justices McKenna and Holmes vigorously dissented from this view, not upon the general principles involved, but because they recognized a real and substantial connection between membership in a labor organization and the carrying on of interstate commerce. Mr. Justice McKenna very convincingly observed:

> A provision of law which will prevent, or tend to prevent, the stoppage of every wheel in every car of an entire railroad system, certainly has as direct an influence on interstate com-

[1] 208 U. S. at 178.

merce as the way in which one car may be coupled to another, or the rule of liability for personal injuries to an employee.[1]

It is difficult to reconcile the interpretation of the commerce clause in the *Adair* decision with the views of the majority of the Court in *Wilson* v. *New,* decided in 1917, which sustained the Adamson Act of 1916.[2] This legislation was an eleventh-hour emergency measure enacted to forestall a threatened nation-wide strike of railroad employees by compelling an immediate increase in the hourly rate of pay. It did so by shortening the standard working day to eight hours, and forbidding the reduction of compensation for a day's work pending the report of a committee of investigation. In the *Adair* case Congress was denied the power to compel the railroads to accede to the demand of their employees to be permitted to belong to labor unions; in *Wilson* v. *New,* Congress was permitted to compel the railroads to accede to demands for an increased rate of pay. The manifest relation of the legislation to interstate transportation was the same in both instances, the prevention of strikes arising from the employees' dissatisfaction with the attitude of their employers. It, therefore, seems impossible to reconcile the decisions in principle. An attempt to do so is made by pointing out that the Adamson Act was sustained by a five-to-four vote of the Court, that one of the majority, Mr. Justice McKenna, stated that the law did not fix wages, but merely regulated the hours of service, a concededly proper exercise of federal power, and that, therefore, the proposition that Congress had power to fix wages to prevent a strike was sustained by the decision of only four justices, a minority of the Court. The fact remains, however, that Mr. Justice McKenna, in his opinion, fully agreed with his other four majority colleagues that

[1] 208 U. S. at 189.

[2] 243 U. S. 332.

Congress had the power to fix wages, in the absence of agreement between carriers and employers, and that the same Court which sustained the Adamson Act, would have sustained a law which frankly ordered an increase in the hourly rate of pay without the circumlocution of accomplishing this result by reducing the length of the standard working day. The law sustained by the Court was in substance a regulation of wages, and not of hours of service, because it contained no provisions which in any way prohibited or penalized employment for more than eight hours. The opinion of the Court in this case, written by Chief Justice White, contains two significant dicta. One is to the effect that Congress may fix a standard of wages only in the absence of an agreement between the parties to a wage dispute, and that an agreement between the carrier and its employees on this subject is not subject to be controlled or prevented by public authority.[1] The other is that in a business charged with a public interest, such as interstate transportation, the employees as well as the carriers could be compelled to accept a wage standard prescribed by Congress, which in principle would sustain a federal compulsory arbitration law applicable to interstate carriers.[2]

Another subject of carrier management, at least one step removed from the actual transportation service, is the keeping of accounts. So far as interstate carriers are concerned, federal authority to inspect accounts and regulate accounting methods was very fully sustained in the period under consideration.[3] The authority is not confined to those accounts which cover transactions of interstate commerce, but ex-

[1] 243 U. S. at 347.

[2] 243 U. S. at 351.

[3] *Interstate Commerce Commission* v. *Goodrich Transit Co.* (1912), 224 U. S. 194; *Kansas City Southern Ry.* v. *United States* (1913), 231 U. S. 423.

tends to all accounts of a carrier engaged in interstate transportation. This broad application of federal power is deemed necessary to prevent the possible concealment of forbidden practices in interstate commerce in accounts which the federal authorities are not permitted to see, and because of the impracticability of separating the accounts, as in the case of expenditures incurred jointly for interstate and intrastate transportation.

The specific forms of federal legislation so far considered in this chapter are, in general, those which have either directly regulated the interstate movement of passengers and freight, or have had such a close relation thereto that the terms or character of transportation service would be substantially affected. In other words, we have been considering legislation which regulates interstate commerce by prescribing the rule by which such commerce is to be governed, and which thereby conforms to Marshall's definition of the federal commerce power. Let us now turn our attention to other forms of legislation which may not be regulations of commerce in this narrower sense, but which clearly fall within a definition embracing the power to foster and protect such commerce. In so doing we are entering the field of federal authority which perhaps may be more accurately described as an exercise of power under the "necessary and proper" clause of the Constitution, than as under the commerce clause.

Of this description is the federal power to construct interstate railroads or to authorize their construcion by individuals or corporations. It was shown in the previous chapter that this power was implicitly recognized by the Court in 1885 in the *Pacific Railroad Removal Cases*.[1] Three years later the Court expressly sustained such legislation, again in connection with the Pacific Railroad project, as follows:

[1] See p. 75, *supra*.

The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from state to state, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce.[1]

The opinion referred to the doubts entertained as to the existence of this power at the time of the construction of the Cumberland and National highways,[2] but pointed out that with the expansion of the country and the introduction of railroads, "land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject".

The Court having recognized Congressional power to authorize the construction of interstate railroads, we are prepared for the next step, the recognition of the power of Congress to create corporations for that purpose. This is but the logical application to the commerce power of the doctrine of *McCulloch* v. *Maryland,* which sustained the authority of Congress to create corporations to carry into execution the fiscal powers specifically granted by the Constitution.[3] Thus the Court held that Congress could create corporations to construct interstate highways and bridges.[4] But legislation of this character would fail to accomplish its purpose of providing highways for the movement of interstate commerce, if the corporations thus created were compelled to depend upon the voluntary action of private owners to secure the land for their right of way. A refusal to grant

[1] *California* v. *Central Pacific R. R.* (1888), 127 U. S. 1, 39.

[2] See pp. 47-50, *supra.*

[3] See pp. 71-74, *supra.*

[4] *Luxton* v. *North River Bridge Co.* (1894), 153 U. S. 525.

the land or the exaction of exorbitant prices for it could easily defeat the project. The power of eminent domain, whereby the corporations can compel the necessary grants at an equitable price to be judicially determined, is obviously essential to these enterprises. This power is usually conferred by the states, but corporations, acting as the agents of Congress in carrying out its constitutional functions, are not left at the mercy of the states, and the Supreme Court has sustained the power of Congress to confer upon such agencies the power of eminent domain to acquire the property needed for an interstate railroad [1] or an interstate bridge.[2]

From the standpoint of the relation of state and federal commercial power, perhaps the most interesting problem is the extent to which Congress may directly regulate commercial transactions which, of themselves, are purely intrastate. In some cases the intrastate movement so directly affects the character of interstate service that regulation of the former may be said to regulate interstate commerce within the narrowest definition of that term. Illustrations of this have already been given in this chapter; for example, federal legislation requiring rolling stock used by interstate carriers in intrastate commerce to be equipped with prescribed safety devices, limiting the hours of service in intrastate commerce of employees who are also employed in connection with interstate train movements, and authorizing the Interstate Commerce Commission to supervise and control all accounts of interstate carriers. All such legislation has been sustained by the Court.[3] To this list may be added the regulation of liability to employees engaged in interstate commerce even when it arises from the negligence of other employees

[1] *Cherokee Nation* v. *Southern Kansas Ry.* (1890), 135 U. S. 641.

[2] *Luxton* v. *North River Bridge Co.* (1894), 153 U. S. 525.

[3] See pp. 122, 123, 129, 133, *supra.*

whose duties relate solely to intrastate transportation,[1] and also the regulation of liability to employees not engaged in interstate commerce arising from violations of the federal Safety Appliance Act, whether or not the defective vehicle was employed in interstate commerce at the time of the injury.[2] The latter form of regulation was sustained, not because of any general federal power to regulate liability for the death or injury of employees employed in intrastate commerce, which was denied in the first *Employers' Liability Cases*,[3] but solely to support by appropriate sanctions the power to regulate the rolling stock of interstate carriers.

Other forms of regulation of intrastate commerce are, however, less direct in their effect upon interstate transportation than the instances just cited, and, therefore, more closely resemble the exercise of power under the "necessary and proper" clause, although in accordance with modern interpretation they are regulations of interstate commerce because they foster and protect the service of transportation between the states. Of foremost interest in this category is the federal power to regulate charges for transportation between points in the same state in order to remove discriminations against interstate commerce. The exercise of this power was one of the outstanding features of the Transportation Act of 1920 and since that date has attracted much attention. The principle, however, was not new in 1920. It had received recognition by the Supreme Court in the *Minnesota Rate Cases*, decided in 1913,[4] and a year later was fully sustained by the Court in its decision in the Shreveport cases,[5] which enforced orders of the Interstate

[1] *Second Employers' Liability Cases* (1912), 223 U. S. 1.

[2] *Texas and Pacific Ry.* v. *Rigsby* (1916), 241 U. S. 33; *San Antonio and Aransas Pass Ry.* v. *Wagner* (1916), 241 U. S. 476.

[3] (1908), 207 U. S. 463.

[4] 230 U. S. 352.

[5] *Houston, E. & W. T. Ry.* v. *United States*, 234 U. S. 342.

Commerce Commission in such a way as to give that body control of certain charges for transportation wholly within the state of Texas. Since these two decisions mark the beginning of the direct conflict between the state and federal commissions in the regulation of rates, they deserve a somewhat more detailed attention than has been given to decisions previously cited.

The *Minnesota Rate Cases* arose from numerous and complicated relations between rates for transportation wholly within Minnesota, fixed by state authority, and interstate rates to and from Minnesota points. A single illustration will serve to bring out the principles involved and the attitude of the Court. Prior to 1907, identical rates had prevailed from the adjacent cities of Superior, Wisconsin, and Duluth, Minnesota, to various points in Minnesota until the state of Minnesota, partly by legislative action and partly by action of its Railroad Commission, ordered general rate reductions between points in Minnesota including the rates from Duluth. Stockholders of the carriers involved brought suit in the United States court to enjoin the enforcement of the rates prescribed by the Minnesota authorities. One of the arguments in support of this suit was that Minnesota had no power to order these reductions because they necessarily imposed a burden on interstate commerce. This may be shown by reference to our illustration. With lower rates in effect from Duluth to Minnesota points, the carriers must establish lower interstate rates from Superior to these same points or the interstate commerce from Superior to Minnesota must diminish because of the rate advantages enjoyed by Duluth. Both of these alternatives affect interstate commerce. At the time these suits were brought, the federal regulatory body, the Interstate Commerce Commission, had taken no action in the matter. Under these circumstances the United States Supreme Court held that the new Minne-

sota rates were valid notwithstanding their admitted effects on interstate commerce. At the same time, Mr. Justice Hughes, who wrote the opinion of the Court, pointed out that the basis of this holding was the entire absence of any federal action to protect interstate commerce from the restrictions incidental to Minnesota regulation of Minnesota rates, and left no room for doubt that the Court would sustain federal action by the Interstate Commerce Commission so regulating Minnesota rates as to protect interstate commerce from discrimination. The principle is thus stated in the opinion:

> There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the nation may deal with the internal concerns of the state, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere.[1]

In the Shreveport cases, decided in 1914,[2] the situation was very similar to that presented in the Minnesota Rate cases, with this distinct difference, however, that the Interstate Commerce Commission had taken action to remove the discriminations against interstate commerce from Shreve-

[1] 230 U. S. 352, 399.

[2] *Houston, E. & W. T. Ry.* v. *United States*, 234 U. S. 342.

port, Louisiana, to Texas points. The principle of the Shreveport decision may be stated as follows: Congress, through its agency, the Interstate Commerce Commission, may intervene in the regulation of intrastate commerce when it deems such intervention necessary and appropriate for the protection of interstate commerce; in such cases the national authority is paramount and may be exercised even to the extent of nullifying state regulation of commerce wholly within the state. The actual facts in the Shreveport cases involved a complicated relationship between state commodity rates and interstate class rates. To clarify the discussion and avoid the complications of technical rate terminology, the principle of the Shreveport cases will be brought out by a somewhat simplified illustration, without, however, distorting the substance of the decision. Let us suppose that Texas through its Railroad Commission had fixed a maximum rate on furniture of 20 cents per hundred pounds from Dallas, Texas, to X, a Texas point equally distant from Dallas and from Shreveport, Louisiana. At the same time, the railroad applied a rate of 50 cents on the interstate haul of the same commodity from Shreveport to X. Dallas and Shreveport are competing jobbing centers. The Interstate Commerce Commission, on complaint of the Railroad Commission of Louisiana, declared that rate situations of which this is typical were unjustly discriminatory against the merchants of Shreveport, further found that any rate above 30 cents for the interstate haul from Shreveport to X was unreasonable, and ordered the railroad to establish a rate that, first, should not exceed 30 cents, and second should not exceed the rate applied by the railroad for the intrastate haul of the same commodity from Dallas to X. Please note the care with which the Interstate Commerce Commission avoided saying what the intrastate Texas rate should be. A simple enough situation one would say at first glance; the railroad

merely had to establish an interstate rate of 20 cents and both its federal and state masters would be obeyed. But the railroad was unwilling to forego the enjoyment of a 30-cent interstate rate, implicitly recognized as reasonable by the only authority which had jurisdiction over it, and sought relief in the Commerce Court. The case was carried to the Supreme Court and the result was the Shreveport decision.

A few extracts will be quoted from the opinion, again by Mr. Justice Hughes:

Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority, and the state, and not the nation, would be supreme within the national field. . . .

It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. The use of the instrument of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for federal intervention. Nor can the attempted exercise of state authority alter the matter, where Congress has acted, for a state may not authorize the carrier to do that which Congress is entitled to forbid and has forbidden. . . .

In removing the injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard, fair to the carrier and to the public. Otherwise, it could prevent the injury to interstate commerce only by the sacrifice of its judgment as to interstate rates. . . .

It was recognized at the beginning that the nation could not prosper if interstate and foreign trade were governed by many

masters, and, where the interests of the freedom of interstate commerce are involved, the judgment of Congress and of the agencies it lawfully establishes must control. . . .

So far as these interstate rates conformed to what was found to be reasonable by the Commission, the carriers are entitled to maintain them, and they are free to comply with the order by so adjusting the other rates, to which the order relates, as to remove the forbidden discrimination.[1]

We might paraphrase Mr. Justice Hughes' decision as applied to our illustration of the Shreveport cases, somewhat as follows: "In interstate commerce there is only one master, Congress. This master has forbidden you to discriminate against the interstate commerce of Shreveport and has given you permission to charge 30 cents on the interstate haul from Shreveport to X; on both these subjects his authority is supreme. The command of your state master to charge only 20 cents for the state haul from Dallas to X presents a dilemma. One horn is to charge more than 20 cents from Shreveport to X which is disobedience of the congressional command not to discriminate against interstate commerce. The other horn is to charge only 20 cents from Shreveport to X, which in effect establishes a maximum interstate rate lower than that authorized by congressional authority. Both horns concern interstate commerce of which there is but the one master, Congress. Therefore you may with impunity disregard your state master's command." Thus the Supreme Court virtually wrote into the order of the Interstate Commerce Commission the following clause: "We hereby find that a state rate of 30 cents on furniture from Dallas to X is not unreasonable, the laws of the state of Texas to the contrary notwithstanding." This, of course, is federal regulation of intrastate rates, and the decision establishes the constitutionality of such regulation when necessary and appropriate for the protection of interstate commerce.

[1] 234 U. S. at 351-360.

The power of Congress to regulate interstate transportation extends to electric railroads as well as to steam railroads. Accordingly, the Court decided that the provisions of the federal Safety Appliance Act are applicable to the equipment of an electric interurban railroad,[1] and that employees of an electric suburban railroad may claim the benefits of the federal Employers' Liability Act.[2] It is true that in one case the Court denied the authority of the Interstate Commerce Commission to regulate an ordinary electric street railroad crossing the state line between the adjacent cities of Council Bluffs, Iowa, and Omaha, Nebraska.[3] This decision, however, was purely a matter of statutory interpretation, and it in no way denies the power of Congress to regulate an interstate street railway. The point was not whether Congress possessed such power, but whether, by the provisions of the Interstate Commerce Act, the authority had been delegated to the Commission. All that the decision means is that Congress, by none of the statutes then applicable, had expressed an intention to give to the commission the power that it sought to exercise.

The decisions of this period show a disposition to sustain the exercise of federal authority whenever the Court is able to discern a reasonably close connection between the subject of federal legislation and interstate commerce. The federal commerce clause was said to be "subject to no limitations save such as are prescribed in the Constitution" in matters having a real and substantial relation to some part of interstate commerce,[4] and was elsewhere described as "control over the interstate carrier in all matters having such a close

[1] *Spokane & I. E. R. R.* v. *United States* (1916), 241 U. S. 344.

[2] *Washington Ry. & El. Co.* v. *Scala* (1917), 244 U. S. 630.

[3] *Omaha and Council Bluffs St. Ry. Co.* v. *Interstate Commerce Commission* (1913), 230 U. S. 324.

[4] Mr. Justice Van Devanter in *Second Emyloyers' Liability Cases* (1912), 223 U. S. 1, 47.

and substantial relation to interstate commerce that it is necessary or appropriate to exercise the control for the effective government of that commerce ".[1]

Among " the limitations prescribed in the Constitution " are the prohibitions of the Fifth Amendment against the taking of liberty and property without due process of law. The exercise of state power is similarly restricted by the provisions of the Fourteenth Amendment. Since neither the nation nor the states may take liberty or property without due process of law, these prohibitions do not, in general, concern the conflict of state and national sovereignty in the control of interstate carriers. There is, however, one exception to this statement, namely when the protection of the Fifth Amendment is sought to prevent federal interference with the rights of persons or corporations under the terms of contracts with or franchises granted by the states. A state franchise is property and the holder thereof cannot be deprived of this property by the federal government, even by the exercise of the power to regulate interstate commerce, without just compensation.[2] But the Court has held that the Fifth Amendment does not restrain the federal government from prohibiting all contracts in restrant of interstate trade,[3] or from otherwise regulating or forbidding contracts relating to interstate commerce which injuriously affect the public interest.[4] This rule applies even to contracts made prior to the enactment of the prohibitory federal legislation, and the execution of such pre-existing contracts can be forbidden.[5] In accordance with the principles of these de-

[1] Mr. Justice Hughes in *Houston, E. & W. T. Ry.* v. *United States* (1914), 234 U. S. 342, 355.

[2] *Monongahela Navigation Co.* v. *United States* (1893), 148 U. S. 312.

[3] *United States* v. *Joint Traffic Association* (1898), 171 U. S. 505.

[4] *Atlantic Coast Line R. R.* v. *Riverside Mills* (1911), 219 U. S. 186, 202.

[5] *United States* v. *Trans-Missouri Freight Association* (1897), 166 U. S. 290.

cisions, the exercise of franchise rights granted by the states, although partaking of the nature of contracts, is undoubtedly subject to federal regulation to the extent that the regulation has a real and substantial relation to interstate commerce.[1] A notable instance of federal interference with the exercise of a state-granted franchise is found in the *Northern Securities* case,[2] in which the defendant corporation, under the corporate powers granted to it by the state of New Jersey, exercised control of competing interstate carriers through stock ownership. The Court sustained the power of Congress to prohibit such an arrangement as in restraint of interstate trade, and said:

> The federal court may not have power to forfeit the charter of the Securities Company; it may not declare how its shares of stock may be transferred on its books, nor prohibit it from acquiring real estate, nor diminish or increase its capital stock. All these and like matters are to be regulated by the state which created the company. But to the end that effect be given to the national will, lawfully expressed, Congress may prevent that company, in its capacity as a holding corporation and trustee, from carrying out purposes of a combination formed in restraint of interstate commerce.[3]

Before leaving the subject of federal power, passing reference should be made to two decisions sustaining the exercise of the federal power to lay and collect taxes and excises upon the operations of the states and of corporations or individuals acting under state authority. It has always been conceded that the federal government cannot interfere by taxation with the functions of the state which are of a strictly

[1] See *State* v. *Western and Atlantic R. R.* (1912), 138 Ga. 835, 76 S. E. 577.

[2] See p. 125, *supra*.

[3] (1904), 193 U. S. 197, 346.

governmental character. When, however, the state extended its activities by engaging in an ordinary private business, such as the sale of liquor, the Supreme Court sustained the collection of the federal internal revenue on sales made by the state.[1] Since the state itself is not exempt from federal taxation in conducting a so-called private business, it follows *a fortiori* that the United States may tax the operations of such businesses when conducted by corporations or individuals acting under franchises granted by the states. Thus the Court upheld a federal excise tax upon the business of all corporations in the United States.[2] An attempt was made to invalidate this tax as applied to corporations supplying transportation, light, water and the like, on the ground that such corporations were acting as agencies of the state because of the public service rendered by them. The Court, however, refused to classify these occupations as part of the essential governmental functions of the state, exempt from federal taxation, and stated the rule as follows:

> The true distinction is between the attempted taxation of those operations of the states essential to the execution of its governmental functions, and which the state can only do itself, and those activities which are of a private character. The former, the United States may not interfere with by taxing the agencies of the state in carrying out its purposes; the latter, although regulated by the state, and exercising delegated authority, such as the right of eminent domain, are not removed from the field of legitimate federal taxation. Applying this principle, we are of opinion that the so-called public-service corporations, represented in the cases at bar, are not exempt from the tax in question.[3]

It is clear that the principle of these decisions sustains fed-

[1] *South Carolina* v. *United States* (1905), 199 U. S. 437.

[2] *Flint* v. *Stone Tracy Co.* (1911), 220 U. S. 107.

[3] 220 U. S. at 172.

eral taxation of even the intrastate business of railroads operated under state charter.

The problem of determining the extent to which state power is curtailed by the United States Constitution in matters affecting interstate carriers is the subject of numerous decisions during the period covered by this chapter. Among the causes contributing to this great mass of judicial interpretation were the great increase in the regulatory activities of the states through the medium of commissions, and the development of new and varied methods of taxing corporate business. In many cases, the United States Supreme Court recognized and sustained the new developments in state legislation under the reserved police and taxing powers of the states. In others, the decisions strengthened the barrier of constitutional interpretation against the exercise of state power. The growing appreciation of the national importance of interstate transportation and of its sensitiveness to the exercise of the police and the taxing power resulted in a long line of decisions declaring that state regulations and state taxes imposed an unconstitutional burden upon interstate commerce. The number of decisions concerning the exercise of state power over commerce is so great that only the more important developments can be traced here.

As in the case of federal power, the general principles defining the limits of state power with respect to interstate commerce had been developed prior to 1887. Of fundamental importance is the principle that the jurisdiction of Congress is exclusive over subjects of interstate commerce requiring a uniform nation-wide plan or system of regulation. As pointed out in the preceding chapter, this principle can be applied only after it is determined whether a given subject requires a uniform system of regulation. This is a legislative problem for the solution of which we should naturally turn to Congress rather than to the Supreme

Court. But we have seen that in the preceding period, when Congress was silent, the Court did not hesitate to act in a *quasi* legislative capacity by declaring that a subject demands uniform legislation, and that in at least one decision,[1] there was a strong intimation that Congress was without power to declare that a subject of interstate commerce permitted diverse plans of regulation if the Court believed that the subject in fact demanded a nation-wide uniform system of regulation. At that time the Court would probably have adjudged such legislation to be an unconstitutional delegation to the states of exclusive Congressional power granted by the Constitution. On this point there was a marked change in the attitude of the Court in the period now considered. It had repeatedly declared that the interstate sale and transportation of commodities was a subject demanding uniform regulation over which Congress alone had jurisdiction, and had applied this rule to prohibit state regulation of interstate liquor traffic, even when manifestly in aid of the state's own internal police policy of protecting the health, morals, and general welfare of its inhabitants by state prohibition laws.[2] Then came the Wilson Act of 1890[3] by which Congress provided that the sale of liquor brought from other states should be subject to the police power of the state in which it was sold, even when in the original packages. The Court had previously held that the sale of interstate consignments of liquor in the original packages was a subject requiring uniformity of regulation, and, therefore, beyond the state police powers and subject only to the exclusive control of Congress.[4] Congress, by the Wilson Act, in substance abrogated this rule so far as the sale of

[1] *Cooley* v. *Board of Wardens* (1851), 12 How. 299. See p. 88, *supra*.

[2] *Bowman* v. *Chicago & N. W. Ry.* (1888), 125 U. S. 465; *Leisy* v. *Hardin* (1890), 135 U. S. 100.

[3] 26 Stat. L. 313.

[4] *Leisy* v. *Hardin, supra.*

liquor is concerned, and by implication declared that the sale of liquor in the original packages was a subject admitting of as many plans of regulation as there are states in the Union. The Supreme Court sustained the power of a state under this act to prohibit such sales of liquor.[1] But by a rather unconvincing process of reasoning, it avoided recognition of the power of Congress to declare that a matter of interstate commerce permits diversity of control, and found that the Wilson Act merely established a uniform rule of regulation of interstate commerce to the effect that interstate shipments of liquor lose their interstate character before the original package is broken.

The Webb-Kenyon Act of 1913[2] brought the matter before the Court in such a form that it had to decide whether Congress has power to subject the interstate transportation and sale of liquor to a plan of regulation which varies with the provisions of state laws. This act prohibited interstate shipments of liquor intended to be received, possessed, sold or in any manner used contrary to the laws of the state to which it was consigned. It, therefore, made different rules applicable to the actual shipment of liquor over different state lines. By no stretch of the imagination could it be said, as was said concerning the Wilson Act, that the diversity of regulation was not encountered until after the shipments had by congressional fiat ceased to be articles of interstate commerce. In sustaining the Webb-Kenyon Act, the Court not only upheld the power of Congress to make such a law,[3] but also declared that under its provisions a state may forbid or prescribe the conditions of shipment of liquor into its territory from other states.[4] The act was not re-

[1] *In re Rahrer* (1891), 140 U. S. 545; *Delamater* v. *South Dakota* (1907), 205 U. S. 93.

[2] 37 Stat. L. 699.

[3] *Clark Distilling Co.* v. *Western Maryland Ry.* (1917), 242 U. S. 311.

[4] *Seaboard Air Line Ry.* v. *North Carolina* (1917), 245 U. S. 298.

garded by the Court as a delegation of congressional power to the states; on the contrary, this legislation throwing open to state regulation the terms and conditions of interstate liquor shipments, was declared to be a proper exercise of the power of Congress to regulate interstate commerce, and the Court stated that the Constitution does not restrict this power by a requirement that regulations enacted shall be uniform throughout the United States.[1]

The Court reached this result without expressly reversing its previous decisions that state regulation of the interstate transportation and sale of intoxicating liquor is unconstitutional because the subject demands a uniform plan of regulation, and did not admit that it had changed its views on this subject. On the contrary, it stated in substance that the prohibitions of state laws would be invalid as applied to interstate shipments but for the provisions of the Webb-Kenyon Act. It is difficult to find a logical basis for the Webb-Kenyon decisions without taking one of three positions, namely:

1. That the Court was in error in its earlier decisions that the Constitution gave Congress exclusive power to regulate the interstate transportation and sale of liquor.
2. That Congress may delegate a part of its constitutional legislative power to the states.
3. That Congress may remove obstacles to the exercise of state power which have been interposed by the Constitution.

The first of these positions is not admitted by the Court, the second it definitely repudiates, and it appears to have taken the third position. It took care to state that its de-

[1] *Clark Distilling Co.* v. *Western Maryland Ry.* (1917), 242 U. S. 311, 327.

cision was based upon the peculiar circumstances obtaining with respect to the transportation of liquor and was not intended to establish a rule of general application.[1] The same position, however, could consistently be taken with respect to other subjects of interstate transportation if particular circumstances were found to exist in support of a legislative determination that diversity of regulation according to state laws is desirable.

If these cases are correctly interpreted as implying that Congress may remove obstacles to the exercise of state power which have been interposed by the Constitution, from what source does Congress derive the power thus to change the effect of constitutional provisions? Certainly not from Article V, which prescribes the procedure for amendment, because that article requires state ratification of amendments. Can authority be found in the grant of legislative powers to Congress contained in Article I? This depends upon our analysis of the judicial process by which the Court previously reached the conclusion that the Constitution gave Congress exclusive power to regulate the interstate transportation and sale of liquor. There are two distinct steps in the process. The first step is the determination of a general principle of interpretation to the effect that the federal commerce power is exclusive when uniformity of regulation is required. The second step is the application of this principle to the transportation and sale of intoxicating liquor by a determination that this subject requires uniformity of regulation. If this latter step be regarded as the judicial determination of a pure question of fact, the answer to which is entirely independent of the views of Congress, it is difficult to find in the legislative powers of Congress authority to change the effect of the Constitution as interpreted by the Court. But the question whether uniformity of regulation

[1] 242 U. S. 332.

is required for the transportation of liquor may be regarded as a matter of legislative discretion, the determination of which is a regulation of commerce. So regarded, the Constitution authorizes Congress to decide this question, concerning which the Court gives effect to its own views only in the absence of congressional action, or in case the action of Congress is so unreasonable as to exceed the proper bounds of legislative discretion. From this standpoint, the Court, without admitting error in its previous expression of its own views, may consistently sustain congressional action at variance therewith because Congress is the constitutional arbiter of matters of legislative discretion. This latter analysis of the situation interprets the Webb-Kenyon Act, not as an amendment of the Constitution made in an unauthorized manner, but as the exercise of constitutional legislative power to determine as a matter of legislative discretion, how a recognized principle of constitutional interpretation shall be applied to the particular situation confronting Congress.

Irrespective of logical analysis, these decisions show that the United States Supreme Court in some circumstances will sustain federal legislation which gives effect to state laws in the regulation of a particular subject of interstate commerce previously declared by the Court to require exclusive federal control. As a result state legislatures may actually prescribe the rules governing this subject. Since federal power to make laws cannot be delegated, it seems to follow that the action of the state legislatures is an exercise of the reserved police power of the states to regulate a part of interstate commerce which, according to the judgment of Congress, permits of diversity of regulation. It is very doubtful whether the Court would give similar deference to the views of Congress if it were convinced beyond reasonable doubt that the particular subject of legislation demands uniformity

of regulation. In that case it would probably be held that congressional action at variance with the Court's views exceeds the bounds of legislative discretion within which the determination of Congress should prevail.

These decisions, however, may point the way to mitigating the severity of the rule that the states are deprived by the Constitution of the power to regulate interstate transportation. They suggest the possibility of similar federal legislation to validate the exercise of state power with respect to other particular subjects of interstate transportation. This may be of supreme importance in determining the policy to be followed with respect to the regulation of interstate transportation by motor vehicles or of interstate transmission of power. It is by no means certain that the best results can be obtained by a uniform nation-wide plan of regulation of these subjects, and if Congress should decide that they admit of diversity of regulation in different localities, it is probable that state regulation would be sustained. In order to avoid conflict of their regulatory policy, a state could with the consent of Congress enter into agreements with other states.[1]

When Congress by its legislation shows that it has determined that a subject of interstate commerce demands a uniform national plan of regulation, it has never been questioned that the jurisdiction of Congress over that subject becomes exclusive of all state action. Such legislation in effect prohibits state action on the subject. Being a regulation of interstate commerce, it is within the constitutional power of Congress. Therefore, it is the supreme law of the land, and any state regulation of the same subject is void because in conflict with the intention of Congress that a single plan of regulation shall prevail. The Court often

[1] Constitution, Article I, section 10, paragraph 3. See Frankfurter, Felix, and Landis, J. M., "The Compact Clause of the Constitution—A Study in Interstate Adjustments", 34 *Yale Law Journal* (1925) 685.

interprets federal legislation under the commerce power as an indication that Congress intends to assume exclusive jurisdiction of the entire subject to which the legislation applies, and thereafter finds all state legislation upon the same subject void even if not in actual conflict with the specific provisions of the federal act. Thus it was held that the mere enactment of the Federal Hours of Service law deprived the states of all power to regulate the hours of service of employees engaged in interstate transportation, even before the provisions of the federal act became effective.[1] Another decision of the same character prohibited the application of the provisions of a state workmen's compensation law to employees engaged in interstate commerce on the ground that Congress had assumed exclusive jurisdiction of the entire subject of liability to such employees by the federal Employers' Liability Act.[2] In this case the state was denied the right to regulate liability even for injuries occurring without fault, as to which the federal act provides no remedy. Other similar decisions held that the 1910 amendments to the Interstate Commerce Act by which Congress undertook the regulation of interstate telegraph service deprived the states of the power to forbid contracts limiting the liability of telegraph companies for errors in unrepeated interstate messages,[3] or to impose penalties for failure to make prompt delivery of such messages.[4]

When Congress is silent concerning the necessity of a uniform, nation-wide rule to govern some particular aspect of interstate commerce, the Court's attitude is thus stated:

[1] *Northern Pacific Ry.* v. *Washington* (1912), 222 U. S. 370.

[2] *New York Central R. R.* v. *Winfield* (1917), 244 U. S. 147.

[3] *Postal Telegraph-Cable Co.* v. *Warren-Godwin Lumber Co.* (1919), 251 U. S. 27.

[4] *Western Union Tel. Co.* v. *Boegli* (1920), 251 U. S. 315.

> The question, therefore, may be still considered in each case as it arises, whether the fact that Congress has failed in the particular instance to provide by law a regulation of commerce among the states is conclusive of its intention that the subject shall be free from all positive regulation, or that, until it positively interferes, such commerce may be left to be freely dealt with by the respective states.[1]

This purports to approach the problem by interpreting the intention of Congress. The procedure outlined could scarcely be avoided, but it results in actual practice in substituting the will of the Court for that of Congress in matters of legislative policy concerning which the latter body fails to act. In following this procedure the Court continued to affirm the general rule that that portion of interstate commerce which consists in the transportation of commodities is national in character, permitting of only one plan of regulation which Congress alone may prescribe.[2]

The effect of these various decisions upon state power will now be briefly summarized. They indicate the possibility of sustaining state regulation of some particular kinds of interstate transportation to the extent that Congress has expressly declared it shall be subject to state law, as has been done with respect to interstate transportation of intoxicating liquor. But when Congress has affirmatively expressed its intention to assume exclusive jurisdiction over a particular subject relating to such transportation, state regulation of that subject is unconstitutional. In matters concerning which Congress has taken no specific action, the states usually are held not to possess the power to impose direct regulations upon interstate transportation.

There are some exceptions to the rule that interstate trans-

[1] *Bowman* v. *Chicago & N. W. Ry.* (1888), 125 U. S. 465, 483.

[2] *Bowman* v. *Chicago & N. W. Ry., supra* at 485; *Leisy* v. *Hardin* (1890), 135 U. S. 100, 109.

portation is a subject which the states must not regulate because it requires a uniform, national plan of regulation. In addition to the exceptions made because of specific congressional declaration that state law shall apply, the Supreme Court itself occasionally fails to enforce this rule. In the preceding chapter it was shown that some state regulation of interstate ferries had been sustained.[1] During the period discussed in this chapter, the problem of state jurisdiction over interstate ferries was quite troublesome to the Court. In 1904, it was held that Illinois could not require a state license to be obtained for operating a railroad car ferry across the Mississippi river from its shores.[2] This decision was carefully restricted to denying the power of the states to regulate ferries which are part of an interstate railroad system and which, therefore, are not ferries in the technical sense of being "a continuation of the highway from one side of the water over which it passes to the other".[3] The Court then expressly refused to make a decision upon the proposition that the respective states have the power to regulate ordinary ferries across state boundaries. In 1913, this issue was dodged again when it was held that a state may not regulate the tolls charged upon an interstate ferry operated by a railroad, even in the case of passengers using only the ferry and not the railroad.[4] This result was reached by finding that Congress had assumed exclusive jurisdiction over such a ferry by the provisions of the Interstate Commerce Act extending its operation to all bridges or ferries operated in connection with any interstate railroad. A year later the problem of state jurisdiction over those interstate ferries concerning which Congress had passed no legislation,

[1] See p. 89, *supra*.

[2] *St. Clair County* v. *Interstate Transfer Co.*, 192 U. S. 454.

[3] 192 U. S. at 466.

[4] *New York Central & H. R. R. R.* v. *Hudson County*, 227 U. S. 248.

was squarely presented to the Court.[1] The ferry was an ordinary highway ferry and not a part of a railroad system. Mr. Justice Hughes, in the opinion of the Court, discussed in much detail the origin and nature of state power to regulate such ferries. His conclusions were that transportation by ferries across state lines is interstate commerce subject to the jurisdiction of Congress, that it is beyond the competency of the states to impose direct burdens thereon, but that in the absence of congressional action, the states may exercise a measure of regulatory power not inconsistent with federal authority and not actually burdening or interfering with interstate commerce. He further found that ferries were not a subject requiring uniformity of regulation, exclusive of state power. It was, therefore, decided that a state may regulate the transactions of such a ferry in its own territory including the ferriage charged from its own shore, without imposing an unconstitutional burden on interstate commerce. Another decision, however, made at the same time denied the right of a state to make its consent a condition precedent to the operation of such a ferry or to burden the business by a privilege tax.[2]

As previously shown, the rule that interstate transportation is a subject requiring exclusive regulation by Congress, can be escaped by finding that particular forms of state action do not regulate but only incidentally affect this subject.[3] The ferry decisions just discussed show that the rule is also subject to exceptions where some restricted part of interstate commerce, such as highway ferries, does not re-

[1] *Port Richmond and Bergen Point Ferry Co.* v. *Hudson County* (1914), 234 U. S. 317.

[2] *Sault Ste. Marie* v. *International Transit Co.* (1914), 234 U. S. 333. State power to regulate interstate transportation by ferry was recently discussed in *Vidalia* v. *McNeely*, U. S. Sup. Ct., June 6, 1927.

[3] See pp. 91, 104, *supra*.

quire uniformity of regulation. Such exceptions, however, according to the ferry cases do not permit state action which is a burden on interstate commerce. We thus have, according to the view of the United States Supreme Court, three differing degrees of intensity of the effect of state legislation upon transportation between the states to each of which different rules of constitutional interpretation apply, when Congress has not acted upon the subject. These are:

1. Legislation which incidentally affects but is not a regulation of interstate transportation. Such legislation is valid if not in actual conflict with laws enacted by Congress.

2. Legislation which, while admittedly a regulation of, does not impose a burden upon interstate transportation. This degree of intensity of regulation is recognized and sustained only with respect to those subjects of transportation which do not require a uniform plan of regulation.

3. Legislation which is characterized by the Court as a burden upon interstate transportation. This is held unconstitutional even when applied to a subject said to permit of diversity of regulation.[1]

A classification thus expressed in general terms, susceptible of a great variety of interpretation, is not very helpful without specific illustration. Some of the more important applications of these rules to the state police and taxing powers in the period under consideration will, therefore, be given. In doing so, it is often impossible to tell in cases sustaining state legislation whether the result was reached because the Court did not consider the legislation to be a regulation of interstate commerce or because the particular matter did not require a uniform plan of regulation.

The exercise of the reserved police power of the states will first be considered. The term "police power" is here

[1] See *Minnesota Rate Cases* (1913), 230 U. S. 352, 396, 400.

used, as in the previous chapter, in the broad sense. The Court continued to give very comprehensive definitions to this reserved power of the states, such as:

The power, whether called police, governmental or legislative, exists in each state, by appropriate enactments not forbidden by its own Constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good. This power in the states is entirely distinct from any power granted to the general government, although when exercised it may sometimes reach subjects over which national legislation can be constitutionally extended.[1]

It may be said in a general way that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.[2]

State statutes reasonably adapted to promote safety in its limits were universally sustained by the Court in the absence of congressional regulation of the subjects to which they applied. The Court said:

The safety of the public in person and property demands the use of specific guards and precautions. The width of the gauge, the character of the grades, the mode of crossing streams by culverts and bridges, the kinds of cuts and tunnels, the mode of crossing other highways, the placing of watchmen and signals at points of special danger, the rate of speed at stations and through villages, towns, and cities, are all matters naturally and peculiarly within the provisions of that law from the authority of which these modern highways of commerce derive

[1] Mr. Justice Harlan in *Lake Shore & M. S. Ry.* v. *Ohio* (1899), 173 U. S. 285, 297.

[2] Mr. Justice Holmes in *Noble State Bank* v. *Haskell* (1911), 219 U. S. 104, 111.

their existence. The rules prescribed for their construction and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the limits of the local law. They are not *per se* regulations of commerce; it is only when they operate as such in the circumstances of their application, and conflict with the express or presumed will of Congress exerted on the same subject, that they can be required to give way to the supreme authority of the Constitution.[1]

The decision from which the foregoing quotation is taken sustained a state statute requiring the licensing of locomotive engineers, even when applied to an engineer employed solely in the operation of interstate trains. In accordance with this principle the states were permitted to require the use of headlights of specified form and power on all locomotives, including those hauling interstate trains,[2] to prohibit passengers standing on the platforms of all railway motor cars operated in the state,[3] to prescribe the size of the crew of interstate as well as intrastate trains,[4] and to prohibit the use of stoves or furnaces in passenger cars.[5] The Court repeatedly sustained the exercise of the state police power to require interstate railroads to construct and maintain bridges and viaducts at the railroad's expense in furtherance of plans

[1] *Smith* v. *Alabama* (1888), 124 U. S. 465, 482. Other cases sustaining the exercise of state police power to regulate the speed of interstate trains in the interest of safety are *Erb* v. *Morasch* (1900), 177 U. S. 584; *Southern Ry.* v. *King* (1910), 217 U. S. 524.

[2] *Atlantic Coast Line R. R.* v. *Georgia* (1914), 234 U. S. 280; *Vandalia R. R.* v. *Public Service Commission of Indiana* (1916), 242 U. S. 255. These decisions applied only to state regulation of locomotive headlights prior to the Act of March 4, 1915, 38 Stat. L. 1192, by which Congress assumed jurisdiction of this subject on interstate railroads.

[3] *South Covington & C. St. Ry.* v. *Covington* (1915), 235 U. S. 537.

[4] *Chicago, R. I. & P. Ry.* v. *Arkansas* (1911), 219 U. S. 453; *St. Louis, I. M. & S. Ry.* v. *Arkansas* (1916), 240 U. S. 518.

[5] *New York, N. H. & H. R. R.* v. *New York* (1897), 165 U. S. 628.

for the elimination of grade crossings.[1] This was done even when a highway crossing the railroad was opened subsequent to the construction of the railroad.[2] In these grade crossing cases, the Court did not even refer to the possibility that the state requirements might be considered to be a burden upon interstate commerce; the opinions were directed solely to the contentions of the carriers that the statutes impaired the contract obligations of charter provisions, denied to them the equal protection of the laws, or deprived them of property without due process of law. Another important illustration of proper use of the state police power to promote safety is found in the decisions sustaining state regulation of the use of highways by motor vehicles, including requirements that state licenses shall be obtained for the operation of cars owned by non-residents and used on interstate journeys.[3] The state, however, must not exceed reasonable limits in restricting interstate transportation in the interest of public safety. For this reason a Georgia statute known as the "Blow Post" law was held to be an unconstitutional burden on interstate commerce.[4] This statute required trains approaching highway crossings to slow down so that they might be stopped in time if any person or thing were crossing the track. It was shown that in a typical case, its enforcement would require 124 slowdowns in 123 miles and add more than six hours to a schedule of four hours and thirty minutes.

[1] *New York & N. E. R. R.* v. *Bristol* (1894), 151 U. S. 556; *Chicago, B. & Q. R. R.* v. *Nebraska* (1898), 170 U. S. 57; *Northern Pacific Ry.* v. *Duluth* (1908), 208 U. S. 583; *Cincinnati, I. & W. Ry.* v. *Connersville* (1910), 218 U. S. 336; *Missouri Pacific Ry.* v. *Omaha* (1914), 235 U. S. 121.

[2] *Cincinnati, I. & W. Ry.* v. *Connersville, supra.*

[3] *Hendrick* v. *Maryland* (1915), 235 U. S. 610; *Kane* v. *New Jersey* (1916), 242 U. S. 160.

[4] *Seaboard Air Line Ry.* v. *Blackwell* (1917), 244 U. S. 310.

State legislation designed to promote the health and morals of the community was usually sustained as a proper exercise of the state police power, where the statutes did not interfere with interstate commerce more than the exigencies of the case required. Thus the Court continued to uphold the validity of reasonable state quarantine regulations applied to interstate commerce.[1] In protecting health by quarantine laws, the Court recognized that state action did more than incidentally affect interstate commerce and had "the most obvious and direct relation" to that subject.[2] They were, nevertheless, held valid because of the necessity that proper health measures should be adopted by the states if Congress does not act, and because these measures should be adapted to varying local exigencies. State regulation of the fumigation, ventilation and cleanliness of vehicles used in interstate transportation was also sustained as a proper exercise of state power to protect health.[3] Of the same general character, perhaps to be related as much to public morals as to public health, is a statute forbidding the operation of trains on Sunday. The Court upheld this statute as applied to interstate trains although interstate commerce was affected thereby to some extent and for a limited time.[4] It must not be supposed, however, that all state legislation purporting to promote public health and morals was sustained. Prior to the passage of the Wilson Act, the states were compelled to keep their hands off of the interstate sale and transportation of intoxicating liquor, notwithstanding the fact that the purpose of state legislation on this subject was to protect the health and morals of the community.[5] It was also held that

[1] *Smith* v. *St. Louis & S. W. Ry.* (1901), 181 U. S. 248.

[2] See *Minnesota Rate Cases* (1913), 230 U. S. 352, 402, 406.

[3] *South Covington & C. St. Ry.* v. *Covington* (1915), 235 U. S. 537.

[4] *Hennington* v. *Georgia* (1896), 163 U. S. 299.

[5] *Bowman* v. *Chicago & N. W. Ry.* (1888), 125 U. S. 465; *Leisy* v. *Hardin* (1890), 135 U. S. 100.

a state statute requiring all beef sold in the state to be inspected by local inspectors twenty-four hours before being killed was invalid because it practically excluded beef from outside of the state from the local market and such exclusion was not reasonably necessary to preserve the health of the state.[1]

We will now turn to the exercise of the state police power to promote the general welfare and convenience of the public. In this field, the United States Supreme Court does not tolerate as much interference with interstate commerce as in state protection of safety, health and morals. Nevertheless, the decisions do recognize that some degree of contact with interstate commerce must be permitted in the exercise of the police power even when safety, health and morals are not directly concerned. Otherwise the recognized power of the states to promote the general welfare and convenience of their inhabitants would be reduced to a mere shell. Therefore, the states are permitted in the exercise of this power to affect interstate commerce to a limited extent, the degree of interference permitted varying with the subject of regultion. There are two distinct classes of state legislation designed to promote public welfare and convenience and affecting interstate transportation. The first embraces state action which directly regulates the transportation of passengers and freight between the states by prescribing the terms and conditions of such transportation. The second embraces state action which makes no attempt to prescribe how interstate passengers and freight shall be transported, but does regulate the instrumentalities used in interstate transportation. While no comprehensive rule can be stated prohibiting all state action falling within the first class or permitting all state action falling within the second, it is obvious that the burden upon interstate commerce resulting from legislation

[1] *Minnesota* v. *Barber* (1890), 136 U. S. 313.

of the former character is more serious and direct, and, therefore, more apt to lead to its condemnation as an invasion of the exclusive power of Congress to regulate interstate transportation.

Nevertheless, there are cases in which the direct state regulation of the terms and conditions of interstate transportation has been sustained in the absence of conflicting federal action. These, in general, fall within the terms of a proposition stated by Mr. Justice Hughes in the *Minnesota Rate Cases* as follows:

> There are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the government because of the necessity that they should not remain unregulated, and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the states should continue to supply the needed rules until Congress should decide to supersede them.[1]

The regulation of the liability of carriers to shippers or passengers arising from misfeasance or negligence in rendering transportation is of this character. From the earliest days, each state has prescribed the rules of liability for causes of action arising within its jurisdiction. So long as Congress remained silent on the subject, the Supreme Court sustained the validity of state statutes defining the liability of carriers in connection with transportation service, even when applied to the interstate transportation of both freight[2] and passengers.[3]

[1] (1913), 230 U. S. at 402.

[2] *Richmond and Alleghany R. R.* v. *Patterson Tobacco Co.* (1898), 169 U. S. 311.

[3] *Chicago, M. & St. P. Ry.* v. *Solan* (1898), 169 U. S. 133; *Chicago, R. I. & P. Ry.* v. *Maucher* (1919), 248 U. S. 359. For the effect of congressional regulation of liability upon state power, see pp. 309-316, *infra*.

The states are also permitted to prescribe the terms and conditions upon which local services incidental to interstate transportation are performed. This includes the regulation of wharfage charges,[1] the weighing of interstate grain shipments and the issuance of weight certificates therefor,[2] and railroad cab service, even when operated solely for the use of interstate railroad passengers.[3] State regulatory statutes concerning all of these subjects have been sustained by the Court. With reference to cab service, the Court took the position that it was not a part of interstate commerce, but merely an independent local service rendered preliminary or subsequent to the interstate journey. The same result, however, could have been obtained by recognizing the fact that the ride to and from the railroad station is a part of the interstate journey, but is a proper subject of state regulation, both because of long-established custom and because of the need of adapting its regulation to local conditions.

But the Court has with few exceptions denied the existence of state power to protect the public need for transportation by direct regulation of the charges for and the service to be rendered in the actual rail movement of passengers and freight between the states. We have already seen that, in the preceding period, the principle was established that Congress has exclusive jurisdiction of the regulation of charges for interstate transportation.[4] This principle was then applied to prohibit the enforcement of state legislation penalizing higher charges for a short haul than for a longer haul on the same line where both hauls were interstate. In the period now under consideration the Court took a further

[1] See *Minnesota Rate Cases* (1913), 230 U. S. 352, 405.

[2] *Merchants Exchange* v. *Missouri* (1919), 248 U. S. 365.

[3] *Pennsylvania R. R.* v. *Knight* (1904), 192 U. S. 21.

[4] *Wabash, St. L. & P. Ry.* v. *Illinois* (1886), 118 U. S. 557. See p. 95, *supra*.

step and held that the exclusive jurisdiction of Congress was unconstitutionally invaded by state legislation prohibiting the charges for transportation wholly within the state from exceeding charges for interstate transportation for a greater distance over the same line.[1] At first glance this would appear to be merely a regulation of intrastate charges; a violation could be removed by reducing intrastate rates without affecting interstate rates. The Court, however, took cognizance of the fact that, in actual practice, the requirements of the statute might be met by increasing interstate rates. This result was characterized as a hindrance to, an interference with, and a regulation of commerce between the states which invalidated the statute.

It must not be supposed that the denial of state power to regulate charges for interstate transportation leaves shippers and passengers absolutely at the mercy of the carriers in the absence of congressional action. The United States Supreme Court recognized the existence of a common-law obligation of those engaged in public callings to render service at reasonable rates and without discrimination, and that state courts may enforce this obligation as a part of the state law, even with respect to transactions of interstate commerce, until Congress intervenes by providing other means of enforcement.[2] With respect to interstate transportation by railroad, Congress did so intervene by the creation of the Interstate Commerce Commission, with power to protect shippers from unreasonable charges and discrimination.[3] The jurisdiction of the Interstate Commerce Commission has not yet been extended to interstate transportation by motor vehicles

[1] *Louisville and Nashville R. R.* v. *Eubank* (1902), 184 U. S. 27.

[2] *Covington and Cincinnati Bridge Co.* v. *Kentucky* (1894), 154 U. S. 204; *Western Union Tel. Co.* v. *Call Publishing Co.* (1901), 181 U. S. 92.

[3] For the effect upon state common-law obligations and remedies, see pp. 300-303, *infra*.

over the public highways, and the common law, enforceable by the state courts, seems applicable to such transportation when rendered by common carriers.

The attitude of the Court towards state regulation of the character of service rendered in interstate transportation is illustrated by its opinion in *South Covington and Cincinnati Street Railway* v. *Covington.*[1] In that case it sustained state legislation reasonably calculated to promote the public health and safety, such as regulations concerning the use of platforms, fumigation, ventilation and cleanliness of cars, but refused to sustain provisions specifying the number of cars to be operated and the number of passengers per car to be carried between adjacent states. It is thus apparent that where the regulation of interstate transportation service is not closely related to safety, health and morals, but merely concerns the public need for adequate transportation, the states are powerless even where Congress has failed to act. The overcrowding of cars, as those who inhabit large metropolitan areas are forcibly reminded, may become more than a matter of public convenience, and enter the field of safety, health and morals. When this is the case, state intervention appears to be entirely consistent with Supreme Court decisions permitting the exercise of state police power.

An exception to the general rule that the Supreme Court will not permit direct state regulation of the service rendered in the actual rail movement of passengers and freight between the states, is found in connection with the distribution of cars in times of car shortage. In dealing with this problem it is absolutely impossible for a state to protect the car supply for its internal commerce without simultaneously regulating the car supply for interstate shipments originating within its borders. Every car given to an intrastate shipper *pro tanto* reduces the supply for interstate shipments and

[1] (1915), 235 U. S. 537.

vice versa. In the absence of federal regulation of car distribution, the Court sustained a state statute requiring carriers to furnish cars within a reasonable time after demand, notwithstanding the fact that it extended to car requirements for interstate shipments.[1] In regulating car distribution the states were, however, required to avoid any unreasonable interference with interstate commerce. An absolute state requirement that carriers shall furnish cars upon written requisition of the shipper within a specified number of days, regardless of any condition except strikes and other public calamities, was held to transcend the police power of the state and to amount to a burden on interstate commerce.[2] Even so rigid and burdensome a requirement was admitted by the Court to be close to the border line of permissible state police power.

We will now consider the second class of state legislation designed to promote the general welfare and convenience of the public, namely that which affects interstate transportation through the regulation of the instrumentalities used therein, without attempting to prescribe the charges for and character of interstate service. The decisions of the period considered in this chapter were very liberal in upholding state legislation of this character making reasonable provision for local needs notwithstanding its indirect effects upon interstate commerce. The state police power to govern its internal commerce and other matters peculiarly of local concern was recognized and was sustained as applicable to interstate carriers in the absence of Congressional action upon the immediate subject of state regulation.[3]

Of primary importance in this field is state regulation of charges by interstate carriers for transportation wholly

[1] *Illinois Central R. R.* v. *Mulberry Hill Coal Co.* (1915), 238 U. S. 275.

[2] *Houston and Texas Central R. R.* v. *Mayes* (1906), 201 U. S. 321.

[3] See *Minnesota Rate Cases* (1913), 230 U. S. 352, 402, 410.

within the state. Every student of transportation is familiar with the fact that any substantial change in the intrastate rate structure usually has a distinct effect upon interstate commerce. This is caused by a variety of interrelations between interstate and intrastate shipments of which perhaps the most important is the competition in the markets within the state between local shippers and shippers from other states. A state statute compelling a substantial reduction of intrastate rates is bound to stop or diminish competing interstate shipments to local markets unless met by a corresponding reduction in interstate rates. But either alternative thus presented, the reduction of interstate rates or the curtailment of interstate traffic, constitutes an indirect regulation of interstate commerce by state action. During the period now under consideration, the United States Supreme Court firmly established the principle that the states have power to regulate the charges of interstate carriers for transportation wholly within the state notwithstanding such effects upon interstate commerce, so long as Congress or its subordinate agency, the Interstate Commerce Commission, fails to act to protect interstate commerce from the discrimination resulting from state action.[1] The Court's decision on this subject in the *Minnesota Rate Cases* has already been outlined in the discussion of federal power.[2] In those cases, a very substantial discrimination against interstate shipments was clearly shown to result from a state-wide reduction of intrastate rates made in pursuance of state statutes and orders of the state regulatory commission. While recognizing that Congress had power to intervene in such a situation, the Court held that, in the absence of federal intervention, the

[1] *Minnesota Rate Cases* (1913), 230 U. S. 352; *Louisville and Nashville R. R.* v. *Garrett* (1913), 231 U. S. 298; *Chicago, M. & St. P. Ry.* v. *Public Utilities Commission* (1917), 242 U. S. 333.

[2] See p. 137, *supra*.

state-enforced reduction of rates was not invalidated by its very substantial interference with interstate transportation. A few extracts from Mr. Justice Hughes' opinion will be given to show the attitude of the Court:

It is competent for a state to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals and welfare of its people, although interstate commerce may incidentally or indirectly be involved. . . .

Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it can not be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the federal power. In such case, Congress must be the judge of the necessity of federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. . . .

When the legislation of the state is limited to internal commerce to such a degree that it does not include even incidentally the subjects of interstate commerce, it is not rendered invalid because it may affect the latter commerce indirectly. . . . Restrictive measures within the police power of the state, enacted exclusively with respect to internal business, as distinguished from interstate traffic, may in their reflex or indirect influence diminish the latter and reduce the volume of articles transported into or out of the state. . . . When, however, the state in dealing with its internal commerce, undertakes to regulate instrumentalities which are also used in interstate commerce, its action is necessarily subject to the exercise by Congress of its authority to control such instrumentalities so far as may be necessary for

the purpose of enabling it to discharge its constitutional function. . . .

Wherever, as to such matters, under these established principles, Congress may be entitled to act, by virtue of its power to secure the complete government of interstate commerce, the state power nevertheless continues until Congress does act and by its valid interposition limits the exercise of the local authority.[1]

The power of a state to regulate rates for intrastate transportation is not unlimited but is subject to provisions of the Fourteenth Amendment against the taking of property without due process of law. These provisions have been held to prohibit state action compelling so great a reduction of rates as to amount to a confiscation of a carrier's property.[2] The general problem of determining when rate regulation is confiscatory is beyond the scope of this discussion as it does not concern the distribution of power between the federal and state governments. One aspect of this problem is, however, of interest. It was at times contended that a state reduction of rates is not confiscatory because the aggregate income of the carrier from both intrastate and interstate traffic, even after the reduction in the intrastate rates, was sufficient to yield a fair return on the value of the carrier's property. This contention received short shrift from the Court, which required each class of traffic to pay its own way and held that from the standpoint of confiscation, the legality of rates prescribed by a state for transportation wholly within its limits must be determined without reference to the interstate business done by the carrier.[3]

[1] 230 U. S. at 402, 403, 410, 411, 412. For discussion of federal power to regulate intrastate rates and the effect of its exercise upon state power, see pp. 137-142, *supra*, pp. 232-238, 303-309, *infra*.

[2] *Reagan* v. *Farmers' Loan and Trust Co.* (1894), 154 U. S. 362; *Smyth* v. *Ames* (1898), 169 U. S. 466; *Minnesota Rate Cases, supra.*

[3] *Smyth* v. *Ames, supra* at 541; *Minnesota Rate Cases, supra* at 435.

The fact that a carrier is operating under federal charter does not prevent the exercise of state regulatory power to prescribe the rates charged by it for intrastate transportation.[1]

The foregoing cases on state regulation of intrastate rates involved state statutes or orders fixing legal maxima of charges. State power extends to other aspects of the rate structure where the legislation is confined to transportation wholly within the state. Thus it was decided that there is nothing in the provisions of the federal Constitution or laws which necessarily prevents a state from prohibiting the receipt of higher charges for short hauls than for longer hauls on the same line when both are wholly intrastate.[2]

Another subject of state regulation in the interests of the general welfare and convenience of the public is the service rendered in transportation wholly within the state. Since such transportation to a very large extent is furnished by carriers also engaged in interstate commerce, state regulation of intrastate service cannot proceed without affecting commerce between the states to some degree. This at once raises the problem of the extent to which a state may affect interstate commerce by service regulations, specifically applicable only to intrastate transportation and adopted for the legitimate purpose of protecting the internal commerce of the state. This problem was the subject of a multitude of decisions in the period considered in this chapter, some of which sustained and others set aside state regulations of this character. The Court apparently followed a rough rule of reason applied with reference to the particular facts in each case after balancing the local needs against the effect upon interstate transportation. A few typical decisions will be cited.

[1] *Reagan* v. *Mercantile Trust Co.* (1894), 154 U. S. 413; *Smyth* v. *Ames* (1898), 169 U. S. 466, 519-522.

[2] *Missouri Pacific Ry.* v. *McGrew Coal Co.* (1917), 244 U. S. 191.

It was held that a state may require the use of the tracks and cars of interstate carriers for the continuous movement of intrastate freight shipments without unloading from the line of one carrier to that of another.[1] The objection was made that the requirement of such interchange was a burden upon interstate commerce because it might deprive a carrier of the rolling stock necessary to handle its interstate traffic, but the Court stated that it will not be presumed that the state will so construe or enforce the order as to interfere with or obstruct interstate commerce.[2]

The difficulty of drawing the line between valid and unconstitutional state regulations of intrastate service is shown by the series of decisions relating to "train stop" regulations, by which is meant regulations requiring certain specified trains or a minimum number of trains per day to stop for intrastate passengers at designated stations. It is, of course, always possible to comply with these orders without stopping trains carrying interstate passengers, either by running additional sections or adding new trains to the schedule. As a practical matter, however, the traffic rarely warrants additional train service, so that the natural result of the enforcement of the regulations is to increase the number of stops of interstate trains, thereby retarding the movement of interstate transportation. Nevertheless the Court sustained a state statute requiring three trains a day in each direction, if that many are operated, to stop at places of 3000 or more inhabitants,[3] and a similar statute requiring four stops per day at every county-seat.[4] On the other hand, it was de-

[1] *Grand Trunk Ry.* v. *Michigan R. R. Commission* (1913), 231 U. S. 457; *Michigan Central R. R.* v. *Michigan R. R. Commission* (1915), 236 U. S. 615, 634.

[2] *Michigan Central R. R.* v. *Michigan R. R. Commission, supra.*

[3] *Lake Shore & M. S. Ry.* v. *Ohio* (1899), 173 U. S. 285.

[4] *Gulf, C. & S. F. Ry.* v. *Texas* (1918), 246 U. S. 58.

cided that an unconstitutional burden was placed upon interstate commerce by a state law which provided that every village of 200 or more inhabitants should be served by at least one train a day in each direction, and by two trains, if four or more were operated.[1] The test seems to be whether the stop requirement is necessary in order to provide adequate local transportation facilities, as is shown by the following extract from the opinion of Mr. Justice McKenna:

> It is competent for a state to require adequate local facilities, even to the stoppage of interstate trains or the re-arrangement of their schedules. Such facilities existing—that is, the local conditions being adequately met—the obligation of the railroad is performed, and the stoppage of interstate trains becomes an improper and illegal interference with interstate commerce.[2]

A state order, similar in principle to the train-stop regulations, required trains to start on schedule time and to wait only thirty minutes for connections. This order was held void as an unlawful interference with interstate commerce as applied to a through interstate train received by the defendant railway from a connection.[3] The observance of the order would have seemed possible if the defendant railway had made up and dispatched an additional section from the junction point, when the train was over thirty minutes late from the connecting road, the regular train following upon its arrival as the second section. This method of operation would affect interstate commerce by imposing upon an interstate carrier the unnecessary financial burden of operating two sections where only one was required by the traffic, and would delay the movement of the regular interstate train

[1] *Chicago, B. & Q. R. R.* v. *R. R. Commission of Wisconsin* (1915), 237 U. S. 220.

[2] *Chicago, B. & Q. R. R.* v. *R. R. Commission of Wisconsin* (1915), 237 U. S. 220, 226.

[3] *Missouri, K. & T. Ry.* v. *Texas* (1918), 245 U. S. 484.

whenever the railroad did not have extra motive power and crews immediately available at the point of connection. The Court, however, believed that the railroad could not free itself from liability for the delay of the interstate train by offering another, and, therefore, that the order unjustly penalized the railroad for delays for which it was not responsible.

The so-called "Jim Crow" laws, which require separate accommodations for intrastate white and colored passengers, are a form of regulation of intrastate commerce which, as applied to interstate railroads, closely approach the border line of interference with transportation between the states. It will be recalled that, in the preceding period, the Court had held that an unconstitutional burden was placed upon interstate commerce by a state law which compelled the admission of an intrastate colored passenger of a steamboat, engaged in both interstate and intrastate transportation, to a cabin which had been assigned to the exclusive use of white passengers.[1] The Court, however, in the period now considered, sustained state laws requiring the segregation of the races, even as applied to intrastate passengers on trains also engaged in interstate transportation.[2] The decisions thus distinguished between a state law requiring intrastate colored passengers to be admitted to all parts of a vehicle used also in interstate transportation, and one requiring the segregation of white and colored intrastate passengers; the former was held unconstitutional while the latter was sustained. Mr. Justice Harlan, in a dissenting opinion, stated that he could see no logical basis for this distinction.[3] There is,

[1] *Hall* v. *De Cuir* (1878), 95 U. S. 485. See p. 93, *supra*.

[2] *Louisville, N. O. & T. Ry. Co.* v. *Mississippi* (1890), 133 U. S. 587; *Chesapeake and Ohio Ry.* v. *Kentucky* (1900), 179 U. S. 388; *McCabe* v. *Atchison, T. & S. F. Ry.* (1914), 235 U. S. 151.

[3] *Louisville, N. O. & T. Ry. Co.* v. *Mississippi, supra.*

however, a difference; the law prohibiting segregation could not be obeyed without actual interference with white interstate passengers by introducing colored intrastate passengers among them, while the law requiring segregation of intrastate passengers could be met without disturbing interstate passengers, by adding to interstate trains an additional car for intrastate passengers with separate compartments for the two races. This method of operation, while undoubtedly affecting interstate transportation, was considered to be no more of a burden than many other police regulations, the validity of which has been sustained. It should be noted that all of the decisions of this period, sustaining state "Jim Crow" laws, expressly construed these laws as requiring the segregation of only *intrastate* passengers, the implication being that it was beyond the police power of the states to compel interstate carriers to separate their white and colored interstate passengers at the state line.[1]

The attitude of the Court was less liberal to state regulations of intrastate service than to state regulations of intrastate rates. Where rates were concerned the Court, as in the *Minnesota Rate Cases,* disregarded the resulting discriminations against interstate transportation, so long as Congress, through the Interstate Commerce Commission, took no action to prevent the discrimination. In the service cases, however, the Court in substance acted as a regulatory commission charged with the duty of protecting transportation between the states from unreasonable interference by state regulations of internal transportation. In so doing, it passed judgment upon the legislative question whether the interference with interstate transportation was reasonably required to meet the local needs for local transportation

[1] But see *South Covington & C. St. Ry. Co.* v. *Kentucky* (1920), 252 U. S. 399, discussed in the following chapter, p. 252, *infra,* which may possibly be interpreted as sustaining state power to require the segregation even of interstate passengers.

facilities.[1] This difference of approach to state rate regulation and to state service regulation was probably due to the fact that, at the time these cases were being decided, Congress had provided in the Interstate Commerce Commission adequate federal machinery for the prevention of rate discrimination against interstate traffic, but had then made no similar provisions giving the federal commission jurisdiction over the kind of questions arising in the service cases. In the rate cases, the Court would have invaded the jurisdiction of the Interstate Commerce Commission by deciding whether state legislation caused unjust discrimination against interstate commerce, before the question had been presented to the Commission. In the service cases, interstate commerce would have been unprotected unless the Court had intervened as it did.

There was a miscellaneous group of cases, passing upon the validity of state action for protecting the public welfare and convenience in local matters, which cannot be classified as either rate or service regulations. These decisions considered the effect of such action upon interstate commerce and, as in the case of service regulations, sustained or set aside the state regulations according to the particular facts of each case. A few illustrations will be given.

A state court ordered the removal of a railroad bridge as a part of a plan for improving local drainage. The order was made regardless of whether the construction of a satisfactory substitute was possible. The United States Supreme Court held that under these circumstances the order was an unconstitutional interference with interstate commerce, the bridge being an essential part of an interstate line.[2] The case is also noteworthy as holding that the freedom of inter-

[1] See *Chicago, B. & Q. R. R.* v. *R. R. Commission of Wisconsin* (1915), 237 U. S. 220, 226.

[2] *Kansas City Southern Ry.* v. *Kaw Valley District* (1914), 233 U. S. 75.

state commerce from state obstruction is not confined to state legislative action, but also extends to interference by any other branch of the state government such as the courts. On the other hand, the Court sustained a city ordinance requiring the removal of a railroad track used for the service of private industries in interstate transportation because the track crossed a thoroughfare blocking access to a union station, it appearing that other connections could be made for car service to the industries.[1] The principal point of distinction between these two cases was the feasibility of providing substitutes for the facilities ordered removed.

A state statute forbidding the consolidation of competing interstate carriers was upheld in the absence of congressional regulation of this subject.[2] In this case the Court expressly made the distinction between state regulation of interstate commerce itself and state regulation of carriers engaged in such commerce. The opinion said:

> In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce and forbid interference therewith; while to the states remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests.[3]

In reaching this decision the Court gave great weight to the fact that the corporate power to purchase the stock and franchise of another corporation was conferred by state charter. Being derived from the state, it was held that the state might accompany this grant of power by such limitations as it chose to impose, including the prohibition of its exercise to eliminate competition.

[1] *Denver and Rio Grande R. R.* v. *Denver* (1919), 250 U. S. 241.

[2] *Louisville and Nashville R. R.* v. *Kentucky* (1896), 161 U. S. 677.

[3] 161 U. S. at 702.

Other illustrations of valid state regulations of the affairs of interstate railways are found in decisions sustaining a state law requiring the semi-monthly payment of their employees [1] and forbidding a change of the location of a railway's general offices and shops.[2] All of these decisions show that the Court is disposed to sustain the police power of the state to regulate matters of local concern in the interests of the general welfare and convenience, and to apply such regulations to interstate carriers in the absence of conflicting federal action, unless the effects upon interstate commerce exceed the reasonable requirements of the local situation.

While the states may, in the exercise of their police power, thus regulate or affect the business of interstate transportation in a variety of ways without violating the commerce clause of the federal Constitution, they are not permitted to withhold the right to engage in interstate commerce nor to make the existence of that right depend upon the fulfillment of state-imposed requirements. A Kentucky statute provided that no agent of an express company, not incorporated under the laws of Kentucky, should carry on business within the state without obtaining a license and showing that the company had at least $150,000 actual capital. This statute was held to be an unconstitutional regulation of interstate commerce in so far as it was applied to corporations engaged therein.[3] In this case the Court said:

> To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere

[1] *Erie R. R.* v. *Williams* (1914), 233 U. S. 685.

[2] *International and Great Northern Ry.* v. *Anderson County* (1918), 246 U. S. 424. See also *Lawrence* v. *St. Louis–San Francisco Ry.*, U. S. Sup. Ct., May 31, 1927.

[3] *Crutcher* v. *Kentucky* (1891), 141 U. S. 47.

corporate facilities, as a matter of convenience in carrying on their business, can not have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject.[1]

This case was followed by a decision that a Kansas statute was unconstitutional which imposed as a condition precedent to the transaction of interstate business in Kansas a requirement that foreign corporations file a financial statement and a list of their stockholders and officers.[2] Similarly a New York statute requiring an express company to take out a local license for transacting interstate business was adjudged to be a violation of the federal commerce clause.[3] The same case set aside a provision for the licensing of the drivers, but did so because of unreasonable qualifications required of the drivers, and not because of any inherent incompetence of state power to require the drivers to be licensed in the interests of public safety; on the contrary, the Court conceded that reasonable provisions for the licensing of drivers handling interstate express shipments do not violate the Constitution. This decision, therefore, brings out the distinction between state regulation of the conditions precedent to engaging in interstate business, which is prohibited, and state regulation of the conduct of that business, which is permitted under many circumstances.

Nor can a state attach unreasonable conditions to the exercise of local privileges by a foreign corporation engaged in interstate commerce within its borders. While reasonable requirements may be imposed by a state concerning the use of its courts by such a corporation, it was held that a state statute was void as a burden upon interstate commerce, because it sought to compel foreign corporations engaged

[1] 141 U. S. at 57.

[2] *International Text Book Co.* v. *Pigg* (1910), 217 U. S. 91.

[3] *Adams Express Co.* v. *New York* (1914), 232 U. S. 14.

therein to file a copy of their certificates of incorporation, to pay a recording fee therefor, and to appoint a resident agent as a condition precedent to bringing suit in the state courts.[1]

For a long time it was supposed that a state had practically absolute control of the transaction by foreign corporations of intrastate business within its borders, and could grant or withhold this privilege, or attach whatever conditions it chose to its exercise. In 1910, however, it was clearly established that, where interstate commerce is affected by the conditions attached to doing intrastate business, the state power to dictate the terms upon which foreign corporations may engage therein is not unlimited. In that year the Court held that an unconstitutional burden was imposed upon interstate commerce by a Kansas statute requiring foreign corporations engaged therein to pay a fee ranging from one-tenth to one-fiftieth of one per cent of their total authorized capital as a condition of their transacting local business in Kansas.[2] Further reference will be made to this case in considering state taxing powers.[3] At the present stage of the discussion it is of interest in showing that the state cannot make use of its right to dictate the terms upon which foreign corporations may engage in intrastate commerce in such a way as to burden the transaction of interstate business. The Court took cognizance of the fact that the defendant, a telegraph company, in order to accommodate the general public and make its telegraphic system effective, must do all kinds of business both interstate and intrastate, and that the intimate connection between the two classes of business made an onerous regulation of one class a burden upon the other.

[1] *Sioux Remedy Co.* v. *Cope* (1914), 235 U. S. 197.

[2] *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1.

[3] See p. 199, *infra.*

It was shown in the previous chapter that the states, in rendering services and providing facilities to promote the safe and expeditious movement of interstate transportation, are making a proper exercise of their police power and are not invading the exclusive jurisdiction of Congress under the commerce clause. In this connection, it was pointed out that the exaction of a reasonable charge as compensation for such services or for the use of such facilities is in no proper sense an exercise of the taxing power or a tax burden upon interstate commerce. Several cases in the period now considered followed this principle. It was the basis of a decision sustaining a state license fee of five dollars as compensation for the services rendered in licensing locomotive engineers in the interests of public safety, even when applied to an engineer engaged solely in the operation of interstate trains.[1] Similarly the states were permitted to impose a so-called "pole tax" upon telegraph companies engaged in interstate business; this was in no proper sense a tax, but was merely a fee for the occupation of the public highways by the poles of the telegraph companies.[2] By far the most important development along this line came with the extensive use of the public highways by motor vehicles on interstate journeys. The non-resident owners of automobiles entering or passing through the states of Maryland and New Jersey resented the laws of those states requiring the payment of a license fee for using their highways, and attacked these laws as an unconstitutional burden upon interstate commerce. These license fees were sustained in two decisions.[3] The requirement of a license for cars of non-

[1] *Smith* v. *Alabama* (1888), 124 U. S. 465.

[2] *Postal Telegraph-Cable Co.* v. *Richmond* (1919), 249 U. S. 252; *Mackay Telegraph and Cable Co.* v. *Little Rock* (1919), 250 U. S. 94.

[3] *Hendrick* v. *Maryland* (1915), 235 U. S. 610; *Kane* v. *New Jersey* (1916), 242 U. S. 160.

residents was declared to be a proper exercise of the police power as facilitating the enforcement of necessary police regulations to preserve safety and order on the highways. The fee was justified as reasonable compensation both for the administrative expenses of the state incurred in the enforcement of the law and for special facilities furnished by the state at its own expense. In the New Jersey case, it appeared that the license fees exceeded the cost of regulation and inspection of motor vehicles, but it escaped condemnation because the excess was applied to the maintenance of the highways. These decisions recognized that the reasonableness of the state's action is subject to inquiry in the United States Courts so far as it affects interstate commerce, and to that extent the state police power is also subordinate to the will of Congress. So far as interstate commerce is concerned, these decisions justify only state fees for the maintenance of the highways and for services rendered in securing their safe and orderly use, and in no way authorize state taxation or regulation of the business of interstate transportation by motor vehicle.

The decisions involving the extent to which the states may affect interstate transportation by the exercise of the taxing power will next be considered. It was shown in the previous chapter that the Court had firmly established two principles limiting the exercise of this power. The first is that the states must not tax the operations of the United States or its duly authorized agencies in carrying into execution the laws of the United States. The second is that state taxation is unconstitutional if it is a burden upon or regulation of interstate commerce. These two principles form the foundation of the structure of judicial definition of state taxing power in its relation to interstate transportation. Building upon this foundation, it was necessary for the Court to examine various forms of state taxation and to determine in

each instance whether the particular kind of tax before the Court fell within the prohibition of the established principles. As a result, a few criteria of varying degrees of dependability were set up for testing the validity of state taxation, some of which were referred to in the previous chapter and others developed in the period now being discussed.

So far as interstate transportation is concerned, the Court devoted but little attention to the principle that the states must not tax the operations of the federal government and its agencies in the execution of the laws of the United States. This is probably due to the fact that interstate transportation was for the most part conducted by railroad corporations created by and deriving their franchises under the laws of the various states. One notable exception to this statement is found in the case of the Pacific railroad system which was constructed as a part of a federal project for uniting the Mississippi Valley with the Pacific coast. The Central Pacific Railroad Company, a constituent part of this system, although a California corporation, exercised franchises to construct and operate a railroad conferred upon it by Act of Congress. The state of California attempted to levy a property tax upon these franchises. The United States Supreme Court, in deciding that this tax was invalid,[1] held that in the exercise of these franchises, the railroad was an agency of the United States, and said:

> It seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a state. The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it, is not only derogatory to the dignity, but subversive of the powers of the government, and repugnant to its paramount sovereignty.[2]

[1] *California* v. *Central Pacific R. R.* (1888), 127 U. S. 1.

[2] 127 U. S. at 41.

The principle that state taxation must not burden or regulate interstate commerce was, however, the subject of many decisions of this period. The Court was here faced by the same problem that was presented by the cases involving the state police power. It had to work out a practical interpretation of the Constitution which would protect interstate commerce from burdensome state interference without depriving the states of adequate powers for efficient local self-government. Recognizing the practical impossibility of divorcing an adequate state taxing power from all contact with interstate commerce, the Court continued to rely upon the familiar distinction between state action, which merely incidentally affects interstate commerce, and that which amounts to a burden upon or regulation of that subject.

The utmost liberality to state taxing power is found in the field of property taxation. The Court had at an early date committed itself to the proposition that a general property tax upon property within the state used in interstate transportation in common with other property of a similar nature, was not an unconstitutional burden or regulation.[1] This rule clearly applied to physical tangible property such as land, buildings, rails, motive power and rolling stock, separately considered. But a new problem arose with the growth of the so-called unit method of taxation, that is, the assessment of railroad property, not as separate items of physical property, but as a single unit embracing all elements of value arising from the combination of the various separate items of physical property into a railroad system and from its operation as such. This method of taxation inevitably involves the assessment of value resulting from the use of the property for the purpose of interstate transportation. It was, of course, found that in many instances the

[1] See p. 105, *supra*.

unit value considerably exceeded the sum of the ordinary market values of the various items of physical property embraced in the system. The excess value thus assessed necessarily varies with the income derived from all the uses of the property including interstate transportation. If a larger revenue is derived from interstate traffic, it is reflected in the net income of the property and in the unit value assessed by the state; if the interstate traffic diminishes in volume with a corresponding decrease in net income, the assessment for purposes of state taxation becomes lower. Since in the long run the assessment of the state property tax under the unit method tends to vary with the results of the business of interstate transportation, it was most earnestly argued that taxes so assessed are a burden upon and regulation of interstate commerce in violation of the Constitution.

The Supreme Court, however, in a long series of decisions has consistently permitted the states to include in their assessment of property, for taxation as such, those elements of value which result from its use in interstate transportation. This rule was distinctly stated by Mr. Justice Brewer in *Cleveland, Cincinnati, Chicago and St. Louis Railway* v. *Backus* (1894) [1] in an opinion which pointed out the impossibility of separating from the value of property that part due to its use in interstate commerce and then said:

> Either the property must be declared wholly exempt from state taxation or taxed at its value, irrespective of the causes and uses which have brought about such value. And the uniform ruling of this Court, a ruling demanded by the harmonious relations between the states and the national government, has affirmed that the full discharge of no duty entrusted to the latter restrains the former from the exercise of the power of equal taxation upon all private property within its territorial limits. All that has been decided is that, beyond the taxation of

[1] 154 U. S. 439, 446.

property, according to the rule of ordinary property taxation, no state shall attempt to impose the added burden of a license or other tax for the privilege of using, constructing, or operating any bridge, or other instrumentality of interstate commerce, or for carrying on of such commerce. It is enough for the state that it finds within its borders property which is of a certain value. What has caused that value is immaterial. It is protected by state laws, and the rule of all property taxation is the rule of value, and by that rule property engaged in interstate commerce is controlled the same as property engaged in commerce within the state. Neither is this an attempt to do by indirection what can not be done directly—that is, to cast a burden upon interstate commerce. It comes rather within that large class of state action, like certain police restraints, which, while indirectly affecting, can not be considered as a regulation of interstate commerce, or a direct burden upon its free exercise.[1]

But it was contended that the unit method was unconstitutional because it assessed, not only the tangible property within the state used for interstate transportation, but also intangible property over which the state had no jurisdiction such as the franchises of foreign corporations to be corporations and to conduct the business of interstate transportation as corporations. The Court, however, definitely decided that the states have power to impose a general property tax upon not only tangible, but intangible, property within their borders used in interstate commerce, and that in the intangible property thus assessed they may include the corporate franchises, granted by other states, including the franchise to engage in interstate commerce, to the extent that these franchises are exercised in the state imposing the tax.[2] In

[1] For further discussion of state power to assess property values resulting from use in interstate transportation, see *Adams Express Co.* v. *Ohio State Auditor* (1897), 165 U. S. 194, 166 U. S. 185; *Union Tank Line Co.* v. *Wright* (1919), 249 U. S. 275.

[2] *Adams Express Co.* v. *Ohio State Auditor* (1897), 166 U. S. 185; *Atlantic and Pacific Tel. Co.* v. *Philadelphia* (1903), 190 U. S. 160; *Western Union Tel. Co.* v. *Missouri* (1903), 190 U. S. 412.

an opinion of the Court discussing the taxability of corporate franchises, Mr. Justice Brewer stated that the franchise to be a corporation is not for all purposes confined to the state that created the corporation, but is carried wherever the corporation goes; he then further pointed out that this is only one of its franchises and said:

> The franchise to do is an independent franchise, or rather a combination of franchises, embracing all things which the corporation is given power to do, and this power to do is as much a thing of value and a part of the intangible property of the corporation as the franchise to be. Franchises to do go wherever the work is done. . . . Do not these intangible properties—these franchises to do—exercised in connection with the tangible property which it holds, create a substantive matter of taxation to be asserted by every state in which the tangible property is found? [1]

Since the state taxing power does not extend beyond its territorial limits, it was necessary to determine what property of a company doing business in several states has a *situs* within the taxing state for purposes of taxation. Particular difficulty arises in connection with the assessment of two classes of property of interstate carriers, namely movable tangible property, such as locomotives and cars, which pass in and out of the taxing state, and intangible property, such as good will, contract rights, and franchises, which is appurtenant to the company's property in several states and is not confined to the taxing state.

In 1888, the Court stated that a state property tax upon rolling stock might be fixed by appraisement and valuation of the average amount within the state during the taxing year, and that the mere fact that the rolling stock was employed in interstate transportation would not render the taxa-

[1] *Adams Express Co.* v. *Ohio State Auditor* (1897), 166 U. S. 185, 224, 225.

tion invalid.[1] This statement, however, was merely a dictum because the decision containing it held that the particular assessment there presented was invalid, not because it was unconstitutional in plan, but because it was not within the terms of the statute under which it was levied. A decade later, however, the Court definitely sustained a Colorado property tax upon a refrigerator car company assessed upon the value of forty cars, the average number employed by it within the state at the same time during the taxing period.[2] This opinion stated that such assessment contemplated only the assessment and levy of taxes upon property situated within the state. The corporation assessed in this case was a foreign corporation. As to such a corporation there seems to be no basis for contending that a state assessment of its rolling stock may exceed the value of the average amount used within the taxing state at the same time during the assessment period. With respect to a corporation created by the taxing state, it was argued that all of its tangible movable property, wherever situated, had a *situs* for the purpose of taxation in the state in which it was incorporated. The Court, however, refused to sustain any such sweeping rule and held unconstitutional a property tax imposed by Kentucky on 2000 freight cars owned by a Kentucky corporation where it was shown that only from 28 to 67 cars were on an average in Kentucky in the years for which the tax was assessed.[3] But it has been held that any rolling stock of a railroad incorporated by the taxing state, which ever comes into the state during the taxing year, has a taxable *situs* therein and may be assessed at its full value, even if a definite proportion of the property so assessed is always outside of

[1] *Marye* v. *Baltimore and Ohio R. R.*, 127 U. S. 117, 123.

[2] *American Refrigerator Transit Co.* v. *Hall* (1899), 174 U. S. 70.

[3] *Union Refrigerator Transit Co.* v. *Kentucky* (1905), 199 U. S. 194.

the taxing state.[1] There is a suggestion in this opinion that immunity from taxation in the home state might be secured to the extent that it could be shown that this rolling stock had been taxed in other states, but this was not definitely decided. These decisions seem to establish clearly that a state may tax as property the average amount of rolling stock employed in interstate transportation within its borders by both domestic and foreign corporations, that in the case of domestic corporations it may also tax at its full value all rolling stock, not taxed elsewhere, which ever comes within its borders during the assessment period, but that rolling stock which never enters the state has no taxable *situs* there even in the case of domestic corporations.

The unit method is frequently used in the assessment of intangible property values within the state. There are two steps in this process; the appraisal of the value of an entire system engaged in interstate transportation in several states, and the apportionment to the taxing state of a part of the aggregate system value. In the appraisal of the aggregate system value, consideration is given to the market value of the securities of the corporation. To this two objections were made; first, that the resulting assessment depends upon and varies with the income derived from interstate transportation, and second that the state is basing its assessment upon property values outside of its territorial limits. The decisions overruling this first objection have already been considered.[2] The answer to the second objection is that while the state is undoubtedly going beyond its territorial limits in the investigation and appraisal of the value of the entire system wherever situated, it is not actually assessing a tax upon extra-territorial values if it makes a

[1] *New York ex rel. New York Central & H. R. R. R.* v. *Miller* (1906), 202 U. S. 584.

[2] See pp. 185-187, *supra*.

just and equitable apportionment of the aggregate system value; this results in the actual assessment of only that part thereof which represents property within its own borders. Assessments following this process of appraising the aggregate value of the system and then apportioning a part thereof to the taxing state have been repeatedly sustained by the Court.[1]

This raises the question of what constitutes a proper apportionment of value to the taxing state. A method commonly followed has been to assess the property within the state at a value which bears the same ratio to the aggregate value of the system as the ratio of the miles operated in the taxing state to the total mileage of the system. This may be called the mileage-proportion method and, in the absence of special facts making it inequitable, was sustained in several decisions as a measure of the assessment for property taxation of the property within the state.[2] It is, of course, a rough rule of thumb and the resulting assessment as a mathematical proposition, not only varies with extra-territorial conditions affecting the aggregate value of the system, but also gives weight to the value produced by the use of the system for interstate transportation both in the taxing state and elsewhere. This can be easily demonstrated. In the absence of construction of additional mileage, the proportion of mileage within the state to total mileage is a constant. The state assessment is reached by applying this constant to a variable, the aggregate value of the entire system as measured by the market value of its securities and other considerations. This variable is just as much affected by a change of conditions affecting value entirely outside of the taxing state,

[1] *Pullman's Palace Car Co.* v. *Pennsylvania* (1891), 141 U. S. 18; *Cleveland, C. C. & St. L. Ry.* v. *Backus* (1894), 154 U. S. 439; *Adams Express Co.* v. *Ohio State Auditor* (1897), 165 U. S. 194, 166 U. S. 185.

[2] See cases cited, *supra*, n. 1.

as by a quantitatively equal change of value due to local conditions. To the extent that the aggregate value of the system varies with its capacity to earn income, an increase in the net return from interstate traffic which never enters the taxing state would be just as much reflected in the state assessment as an equal increase in the net return from wholly intrastate traffic. On the other hand, it must be recognized that an increase in value of property within the taxing state is by this method not fully assessed, but is assessed at only a small fraction of its actual amount. The fraction of property value in the taxing state, which thus escapes assessment, tends to counterbalance the fractional assessment of extra-territorial value, if we concede the propriety of assessing the value arising from the use of the property within the state for interstate transportation. The Court, as we have seen, has held that a state may impose a property tax upon value arising from interstate transportation within its borders; it also, in the decisions cited, refused to be controlled by the fact that technically the mileage-proportion method imposes a fractional assessment upon values beyond the jurisdiction of the taxing state, but was guided by the practical effect of the method, namely, that in the long run the amount of the assessment will roughly correspond to values within the state.

The Court's position was stated by Mr. Justice Brewer as follows:

The true value of a line of railroad is something more than an aggregation of the values of separate parts of it, operated separately. It is the aggregate of those values plus that arising from a connected operation of the whole, and each part of the road contributes not merely the value arising from its independent operation, but its mileage proportion flowing from a continuous and connected operation of the whole. This is no denial of the mathematical proposition that the whole is equal

to the sum of all its parts, because there is a value created by and resulting from the combined operation of all its parts as one continuous line. . . .

Now, when a road runs into two states each state is entitled to consider as within its territorial jurisdiction and subject to the burdens of its taxes what may perhaps not inaccurately be described as the proportionate share of the value flowing from the operation of the entire mileage as a single continuous road. It is not bound to enter upon a disintegration of values and attempt to extract from the total value of the entire property that which would exist if the miles of road within the state were operated separately.[1]

The mileage proportion is not, however, a method of apportionment which the Court will sustain under all circumstances. Special conditions may exist which make the application of this method extremely inequitable. For instance, the average density of traffic within the taxing state may be far less than that of the entire system; or the aggregate value of the entire system may be augmented by the ownership of valuable terminal property in other states with no corresponding elements of value in the taxing state. Where such circumstances do appear, the Court has refused to sustain the assessment of a state property tax on the mileage proportion basis. Thus, in *Union Tank Line Co.* v. *Wright*,[2] a Georgia tax was assessed upon the personal property of a tank-car company by appraising the aggregate value of all its cars and other personal property, and taking a proportion of that aggregate value equal to the ratio of the track-mileage over which it operated cars in Georgia, to the total track-mileage over which its cars ran. This tax was held to be an unconstitutional burden upon interstate commerce because, as Mr. Justice McReynolds said that " during a year two or three cars might pass over every mile of rail-

[1] *Cleveland, C. C. & St. L. Ry.* v. *Backus* (1894), 154 U. S. 439, 444.

[2] (1919), 249 U. S. 275.

road in one state while hundreds constantly employed in another moved over miles of less total length ".[1] In other words, this method of apportionment is invalid where the traffic density in the taxing state is substantially less than that for the entire system. Indeed, there is much in the majority opinion in this case to discredit the previous decisions sustaining the use of the mileage-proportion method. The majority, however, were convinced that in this particular instance the method resulted in a grossly excessive valuation, and a strong minority, in a vigorous dissenting opinion, sought to sustain the mileage-proportion rule. It is, therefore, extremely doubtful whether the Court would go so far as to overrule the long line of decisions previously cited, by holding that the mileage-proportion method of assessment is unconstitutional even when no special circumstances exist to make its use inequitable.

The extreme liberality of the Court in applying the principle that the states may levy a property tax upon property within their borders used in interstate commerce is shown by a series of decisions to the effect that state taxation levied in lieu of property taxes is valid even if its character and method of assessment are such that it would be held unconstitutional as a regulation of interstate commerce, if it were levied in addition to and not as a substitute for a general property tax. Some illustrations will be given. Mississippi levied a privilege tax on various corporations which was applied to express companies, telegraph companies and sleeping-car companies doing an interstate business. This tax was in lieu of all other state taxation and was, therefore, sustained by the Court, which said: "The tax becomes substantially a mere tax on property and not one imposed on the privilege of doing interstate business. The substance and not the shadow determines the validity of the exercise of the power." [2]

[1] (1919), 249 U. S. 283.

[2] *Postal Telegraph Cable Co.* v. *Adams* (1895), 155 U. S. 688, 698.

Minnesota imposed a tax of six per cent upon the gross receipts of express companies from transportation within the state. The state court construed this to include receipts from interstate transportation which were attributable to the part of the journey performed in Minnesota. It is difficult to conceive of any more direct tax burden upon interstate commerce than a tax measured by the gross receipts derived therefrom. The United States Supreme Court, nevertheless, sustained the tax, the statute under which it was assessed having provided that it should be in lieu of taxes upon the property of the corporations subject thereto.[1] But the Court would scarcely go so far as to sustain a privilege or gross receipts tax levied in place of a property tax, if the amount thereof substantially exceeded the sum which might be leviable upon the corporation property if it were subject to a general property tax.[2]

Turning now from property taxes, or taxes levied in lieu thereof, to privilege and occupation taxes and other taxes of a similar nature, we find the Court much more disposed to hold that state taxation is an unconstitutional burden upon or regulation of interstate commerce. We have seen in the previous chapter that when the subject upon which a state privilege or occupation tax was directly levied was the use, construction or operation of any instrumentality of interstate commerce or the carrying on of such commerce, the taxation was held unconstitutional.[3] The Court continued to enforce this rule rigorously. It was restated by Mr. Justice Bradley in 1888 as follows:

No state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation

[1] *United States Express Co.* v. *Minnesota* (1912), 223 U. S. 335. *Accord, Cudahy Packing Co.* v. *Minnesota* (1918), 246 U. S. 450.

[2] See *Postal Telegraph Cable Co.* v. *Adams* (1895), 155 U. S. 688, 696.

[3] See pp. 104-111, *supra*.

of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress.[1]

In the decision from which this quotation is taken, the Court held that the commerce clause was violated by an ordinance of the city of Mobile imposing an annual license fee upon telegraph companies doing business in the city, as applied to a company engaged in interstate business. In accordance with this rule, a state requirement of the payment of a license fee for the privilege of engaging in the business of interstate transportation in any form was uniformly condemned.[2] Likewise, a Texas tax, not a property tax, levied on all railroads doing business in the state "equal to" a percentage of the gross receipts from both interstate and intrastate traffic within the state, was held unconstitutional.[3] It is not clear from the wording of the statute imposing this tax just what was intended to be the subject of taxation. The legislature avoided a wording which would appear to tax the gross receipts as such but imposed the tax upon "railroads" and measured it by their gross receipts. It could not have been intended to be a tax upon the railroads as property, because they were subject to another property tax upon their valuation as going concerns. No other plausible basis of taxation appearing, the Court regarded the tax as aimed directly at the receipts derived from interstate commerce, and, there-

[1] *Leloup* v. *Port of Mobile*, 127 U. S. 640, 648.

[2] *Crutcher* v. *Kentucky* (1891), 141 U. S. 47 (agency of express company); *Allen* v. *Pullman's Palace Car Co.* (1903), 191 U. S. 171 (sleeping cars); *St. Clair County* v. *Interstate Transfer Co.* (1904), 192 U. S. 454 (interstate car ferry).

[3] *Galveston, H. & S. A. Ry.* v. *Texas* (1908), 210 U. S. 217. *Accord, Oklahoma* v. *Wells, Fargo & Co.* (1912), 223 U. S. 298.

fore, as imposed upon their interstate business. In this light, it was held to be an unconstitutional burden upon and regulation of interstate commerce.

The cases cited in the preceding paragraph all concern taxes levied directly upon the business of interstate commerce. By this it is meant that the person or corporation assessed became subject to the tax from the mere fact of doing interstate business within the state, regardless of whether local privileges or franchises were exercised. A somewhat different situation arises when a privilege or occupation tax is imposed upon the exercise of franchises granted by the state or of the privilege of transacting intrastate business. The state's taxing power, in general, embraces the taxation of such privileges, just as it embraces the taxation of property within its borders. Unlike property taxation, however, state taxation of the exercise of local privileges is subject to close scrutiny by the Court as to the extent to which the tax is in fact a burden or change upon interstate commerce, and under many circumstances has been held unconstitutional because of its effects thereon.

In connection with the taxation of the exercise of the corporate franchises granted by the taxing state, the Court had previously indicated its opinion that such a tax must not be measured by the gross receipts derived from interstate transportation or fluctuate therewith.[1] This principle appears to have received the continued approval of the Court.[2] Where, however, the tax on the corporate franchise was measured, not by gross receipts, but by the total amount of paid-in capital, the Court sustained such a tax even when the corporation's business consisted partly of interstate commerce, and the capital represented property beyond the tax-

[1] See *Philadelphia & S. M. S. S. Co.* v. *Pennsylvania* (1887), 122 U. S. 326 and discussion, p. 108, *supra*.

[2] See *Kansas City, Ft. S. & M. Ry.* v. *Kansas* (1916), 240 U. S. 227, 231.

ing state.[1] To the extent that the corporation required a greater amount of capital to engage in interstate commerce than was required for its local business, such a tax was obviously a charge upon its interstate business to be met from the receipts derived therefrom. It was nevertheless not considered a burden upon or regulation of interstate commerce.

During the period now discussed, there was a change in the Court's attitude toward state taxation of the privilege of doing intrastate business within its borders, resulting in a very distinct limitation of state power when such a tax is imposed upon foreign corporations engaged in interstate commerce. This tax sometimes took the form of a lump sum exacted for the privilege of doing a substantial amount of intrastate business, and was not imposed upon corporations engaged only in interstate commerce; in that form it was usually sustained.[2] Ordinarily such a lump-sum tax is regarded merely as a burden on the intrastate business which can be charged against the income therefrom, and it does not vary with the receipts from interstate business or the amount of property used therein. Viewed in this light, there does not appear to be a connection with interstate commerce substantial enough to justify its condemnation as a burden or charge on interstate business. With interstate carriers, however, the interstate and intrastate business are usually so closely connected that one cannot be conducted without the other. There are few railroads which can afford to operate solely in interstate commerce without the additional revenue derived from their intrastate operations. Even so, no substantial burden or charge is imposed on interstate commerce

[1] *Kansas City, Ft. S. & M. Ry.* v. *Kansas, supra*; *Kansas City, M. & B. R. R.* v. *Stiles* (1916), 242 U. S. 111.

[2] *Allen* v. *Pullman's Palace Car Co.* (1903), 191 U. S. 171 (a tax of $3000 per annum for doing intrastate sleeping car business); *Kehrer* v. *Stewart* (1905), 197 U. S. 60 (a tax of $200 per annum upon agents of packing houses doing local business).

if the lump-sum tax can be paid from intrastate receipts without unreasonable reduction of the net income from traffic between points in the state. Such a tax, however, can be made so excessive as to leave little or no return from the intrastate traffic, and thus indirectly diminish the return from interstate commerce. In 1903, the Court said that this would not invalidate the tax.[1] But a much later decision suggests that, where a corporation must from the nature of its business engage in both local and interstate commerce, a tax upon the former exceeding the net return therefrom is a direct and unconstitutional burden on interstate commerce.[2]

The most radical change in the Court's attitude toward state taxation of the privilege of transacting local business is found in cases where the tax is not a fixed amount but varies with some factor not directly taxable by the state such as the total gross receipts, including those derived from interstate business, or the total capital of a foreign corporation, including that invested outside of the taxing state. Formerly the Court held that a state, having the absolute power of excluding foreign corporations from transacting intrastate business within its borders, could impose such conditions upon permitting them to enter the state for that purpose as it might deem expedient.[3] Accordingly, the Court sustained a state tax upon the business of a foreign corporation measured by the value of its entire capital, most of which was outside of the taxing state.[4] The leading case marking a change from this position is *Western Union Tele-*

[1] *Allen* v. *Pullman's Palace Car Co., supra.*

[2] *Postal Telegraph-Cable Co.* v. *Richmond* (1919), 249 U. S. 252, 258. But see *Postal Telegraph-Cable Co.* v. *Fremont* (1921), 255 U. S. 124, p. 285, *infra.*

[3] *Horn Silver Mining Co.* v. *New York* (1892), 143 U. S. 305.

[4] *Horn Silver Mining Co.* v. *New York, supra.*

graph Co. v. *Kansas, ex rel. Coleman,* decided in 1910.[1] There a Kansas statute, as a condition of doing a local telegraph business in Kansas, required a foreign telegraph corporation to pay into the state school fund a fee measured by a percentage of its entire capital, wherever located and invested. This tax was declared unconstitutional, both as a confiscation of property and as a burden upon interstate commerce. A minority of three, however, concurred in a dissenting opinion by Mr. Justice Holmes, which adhered to the old rule that, "as to foreign corporations seeking to do business wholly within a state, that state is the master, and may prohibit or tax such business at will".[2] But the majority laid stress upon the fact that "the telegraph company in order to accommodate the general public and make its telegraph system effective, must do all kinds of telegraph business" both local and interstate. Since the telegraph company, as a practical proposition could not escape the state tax by withdrawing from intrastate business without serious impairment of the efficiency of its interstate service, Mr. Justice Harlan said, in the majority opinion:

The statutory requirement that the telegraph company shall, as a condition of its right to engage in local business in Kansas, first pay into the state school fund a given per cent of its authorized capital, representing all its business and property everywhere, is a burden on the company's interstate commerce and its privilege to engage in that commerce, in that it makes both such commerce, as conducted by the company, and its property outside of the state, contribute to the support of the state's schools. Such is the necessary effect of the statute, and that result can not be avoided or concealed by calling the exaction of such a per cent of its capital stock a "fee" for the privilege of doing local business. To hold otherwise, is to allow

[1] 216 U. S. 1.

[2] *Ibid.* at 52.

form to control substance. It is easy to be seen that if every state should pass a statute similar to that enacted by Kansas, not only the freedom of interstate commerce would be destroyed, the decisions of this Court nullified, and the business of the country thrown into confusion, but each state would continue to meet its own local expenses not only by exactions that directly burdened such commerce, but by taxation upon property situated beyond its limits.[1]

The underlying principle of this decision is that a state must not, in fact, tax the interstate commerce of a foreign corporation by a tax nominally imposed upon the privilege of transacting intrastate business. The principle is violated when the tax is measured by some factor which the state can not tax directly, such as the capital invested outside of the taxing state, if the corporation cannot escape the tax by abandoning its local business without impairing the efficiency of its interstate service.[2] Since the intrastate and interstate operations of railroad corporations engaged in commerce between the states are usually inseparable, a state tax upon their privilege of doing intrastate business must not be measured by capital representing property beyond the territorial jurisdiction of the taxing state.

The prohibition of the *Kansas* decision, however, was not

[1] 216 U. S. at 37.

[2] The Supreme Court was somewhat more liberal in cases involving state taxation of the local business of foreign corporations, engaged in manufacturing, mining or trading, whose intrastate and interstate operations are more readily separable than those of railroads and telegraph companies. In such cases taxation measured by the entire capital employed both in the taxing state and elsewhere was sustained, where the maximum amount assessable was limited to a fixed sum. *Baltic Mining Co.* v. *Massachusetts* (1913), 231 U. S. 68; *Cheney Brothers Co.* v. *Massachusetts* (1918), 246 U. S. 147. When the maximum limit was removed, the tax was declared an unconstitutional burden on interstate commerce. *International Paper Co.* v. *Massachusetts* (1918), 246 U. S. 135. See also *Looney* v. *Crane Co.* (1917), 245 U. S. 178.

extended to state taxation of the exercise of the franchise to do intrastate business when measured by only the amount of the corporation's capital which represents property in the taxing state. Since a direct property tax on all property within the territorial jurisdiction of the state, including that used in interstate transportation, had been repeatedly sustained, the Court decided that the value of such property could be made the measure of a state franchise tax on the privilege of transacting local business.[1] In fact, a state may simultaneously impose a general property tax upon a corporation's property within its borders and a franchise tax measured by the value thereof; such double taxation, not being based on arbitrary distinctions, is not unconstitutional.[2]

The principle of *Western Union Telegraph Co.* v. *Kansas* is clearly applicable to state taxation of intrastate business measured by the gross receipts from all business within the state, including receipts from interstate traffic. So measured, a tax is, in fact, an even more direct charge upon interstate business than a tax measured by the total amount of the corporation's capital. When the amount assessed varies directly with gross receipts, the least fluctuation in interstate traffic is reflected in the tax, but a moderate change in the volume of traffic between the states might occur without affecting the amount assessed upon the basis of total capital employed. It is true that, early in the period now considered, the Court in at least two decisions appeared to sustain the use of gross receipts from both interstate and intrastate commerce as a measure of state taxation of the privilege of engaging in intrastate business.[3] Such an attitude, however, was entirely consistent with the old rule that the

[1] *St. Louis, S. W. Ry. Co.* v. *Arkansas* (1914), 235 U. S. 350.

[2] *St. Louis, S. W. Ry. Co.* v. *Arkansas, supra.*

[3] *Maine* v. *Grand Trunk Ry.* (1891), 142 U. S. 217; *Ficklen* v. *Shelby County* (1892), 145 U. S. 1.

states could impose whatever conditions they saw fit upon foreign corporations entering their borders to do local business, which was not definitely overruled until the *Western Union* decision in 1910. The validity of the tax in one of the earlier cases [1] was afterwards attributed by the Court to the fact that it was imposed in lieu of a personal property tax,[2] although a careful reading of the original opinion does not reveal that the Court had this distinction in mind when the case was decided. The other case [3] involved a tax upon carrying on the business of commission merchants, which is vastly different from the business of transportation in the degree to which its intrastate and interstate operations are mutually interdependent. In the light of the *Kansas* decision in 1910, neither of these earlier cases can now be regarded as authority for permitting the states to tax the intrastate business of interstate carriers upon the basis of their gross receipts within the state from all sources. Such a tax measured by gross receipts, if those from interstate traffic are included, must now be regarded as a burden upon and regulation of commerce between the states in violation of the commerce clause.

Another illustration of the principle that a state must not use the taxation of local privileges as a means of imposing a burden upon interstate commerce is found in a case involving a state tax upon the privilege of mortgaging property within its borders to secure an issue of corporate bonds.[4] The acts of mortgaging property and selling bonds secured by such a mortgage are not interstate commerce, and are in general proper subjects of state taxation. The mere fact that the tax is paid by a corporation engaged in interstate

[1] *Maine* v. *Grand Trunk Ry., supra.*

[2] *Galveston, H. & S. A. Ry.* v. *Texas* (1908), 210 U. S. 217, 226.

[3] *Ficklen* v. *Shelby County, supra.*

[4] *Union Pacific R. R.* v. *Public Service Commission* (1918), 248 U. S. 67.

commerce or that the mortgaged property is used therein, would seem to afford no stronger grounds for condemning the tax than appear in connection with a state property tax upon the same property. In the case just cited, the Union Pacific Railroad placed a mortgage on its entire system, located both in Missouri and other states, to secure a corporate bond issue to cover expenditures made mostly outside of Missouri. For the privilege of mortgaging the Missouri property, that state sought to levy a tax of over $10,000 measured by a percentage of the entire bond issue. This was held to be an unconstitutional burden upon interstate commerce. Here again a tax upon a proper subject of state taxation was rendered invalid by the measurement used. If the state had sought to compute the proportionate part of the bond issue attributable to the property mortgaged in Kansas, and had applied the rate of taxation only to that part of the issue, the tax, in all probability, would have been sustained.

A general income tax, strictly speaking, is neither a property, privilege nor occupation tax. Yet as applied to corporations engaged in interstate commerce, it closely resembles in its practical effects a property tax assessed by the unit method of combining in a single assessment all elements of property value, both tangible and intangible. Since the property value of a railroad system, considered as a unit, depends upon its capacity to earn an income, its assessment under the unit method is to all intents and purposes a capitalization of the net income, and the resulting tax tends to vary directly with the prospective income to be derived therefrom. The income tax assesses income actually earned; the property tax assesses the capacity to earn it. As capacity is largely judged by performance, it is apparent that the two taxes as applied to interstate carriers are in principle the same. It is, therefore, not surprising to find that the Court held that a state, in levying a general income tax upon the

gains and profits of a domestic corporation, may include in the computation the net income derived from transactions in interstate commerce without contravening the commerce clause of the Constitution.[1] In this decision, the Court found it necessary to distinguish between the use of gross receipts derived from interstate commerce, which it prohibits, and of net income from that source, as a basis for state taxation. This distinction was made by Mr. Justice Pitney as follows:

> The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax can not be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the states are not exempted by the Federal Constitution because they happen to be engaged in commerce among the states.[2]

[1] *United States Glue Co.* v. *Oak Creek* (1918), 247 U. S. 321.

247 U. S. at 328, 329.

In the light of these various decisions, it is clear that the validity of state taxation cannot be judged by the extent to which it imposes a burden upon interstate carriers which must be met from interstate revenues. A corporation created by one state may go into a second state to engage in interstate transportation and be subjected to an exceptionally high rate of property taxation, which it can be compelled to pay. It may go into a third state which imposes only a small property tax, but which in addition thereto imposes a moderate tax on its gross receipts from interstate traffic. Even though the aggregate amount of taxation in the third state is smaller in proportion to the interstate business transacted than in the second state, the gross receipts tax of the third state is unconstitutional and void. Again, this corporation in the state of its origin may be compelled to pay, in addition to its property taxation, a tax upon the privilege of exercising its corporate franchise measured by its entire paid-in capital, regardless of the amount thereof actually invested in the taxing state. But if a tax of the same amount and measured in the same way is imposed upon the same corporation by a foreign state for the privilege of doing intrastate business therein as a corporation, and if this local business can not be abandoned without impairing the efficiency of its interstate operations, the tax is void. This is true, regardless of the fact that in both instances the states are taxing the exercise of privileges granted by the taxing state, and that the local exercise of the corporate franchises may be far less in the home state than in the second state. It would be futile to multiply illustrations of the impossibility of reconciling the decisions judged solely from the criterion of the magnitude of the charge imposed upon interstate transportation.

We must remember, however, that it would be impossible for the Court to approach this problem by weighing the

actual effect of each particular tax upon each corporation affected, and holding invalid only those assessments which seemed to impose an unreasonable burden upon the interstate business. In order to establish even a semblance of order and to avoid an overwhelming multiplicity of litigation, it was necessary for the Court to base its decisions upon the general character of the scheme of taxation rather than the actual effects of a specific statute upon specific litigants, and to conform such decisions to more or less general principles. Such procedure must, of course, result at times in sustaining some taxation which is in fact more of a burden upon the interstate business of particular carriers than other taxation condemned by the Court.

The Court in all of the decisions was earnestly endeavoring to accomplish two purposes, namely to compel interstate carriers to bear their fair share of the burden of the expense of state government and to protect their interstate business from state-imposed burdens or regulations. These two purposes necessarily conflict and their complete attainment is impossible. The Court would find it less difficult to reconcile its decisions if it would avoid general statements to the effect that state taxation must not burden or regulate interstate commerce and if it would expressly limit its efforts to the prevention of unduly oppressive burdens or regulations. It confessed its inability to find a strict logical criterion to apply to the dilemma presented in state taxation cases when Mr. Justice Holmes said:

We are to look for a practical rather than a logical or philosophical distinction. The state must be allowed to tax the property, and to tax it at its actual value as a going concern. On the other hand, the state can not tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely

to attempt or to effect injurious regulations than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form.[1]

In the light of this frank statement, we do best to abandon any attempt to find in the decisions a logical criterion for testing the effects of state taxation upon interstate commerce. Instead we must recognize that the Court is, to paraphrase Mr. Jusice Holmes, doing the best it can to draw a practical line which will prohibit only those schemes of taxation which are more likely to attempt or to effect injurious regulation. We may not agree with the line drawn by the Court. It is difficult to see how a state is more likely to attempt to impose oppressive regulation by a general business or occupation tax applied to all businesses, including interstate commerce, conducted within its borders than by a general property tax which applies also to property used in interstate transportation. Yet the universality of the tax, which would seem to insure against its use as an instrument of oppression, is sufficient to sustain the property tax, but not the business or occupation tax. However much we may dissent from the practical judgment of the Court in the distinctions made in these taxation cases, we cannot accuse it of logical inconsistency when it does not profess to reconcile all its decisions concerning the validity of state taxation affecting interstate commerce.

A summary will now be given of the principal develop-

[1] *Galveston, H. & S. A. Ry.* v. *Texas* (1908), 210 U. S. 217, 227.

ments of the period from 1887 to 1920 in the judicial interpretation of the relation of state and federal powers in the control of interstate carriers. So far as federal power is concerned, the most noticeable change in general interpretation was the growth of the conception that the enumerated power to regulate commerce among the several states embraced legislation designed to foster and protect such commerce as well as legislation prescribing the rules by which its conduct should be governed. This was, however, a change in the form rather than in the substance of constitutional interpretation. It merely transferred the attention from the "necessary and proper" clause to the commerce clause as the source of federal authority to exercise commercial power in forms which are not, in the narrowest sense, regulations of commerce, but which seem to be "requisite and appropriate" means to the execution of the power to regulate commerce within Marshall's definition of "necessary and proper". The general interpretation of the aggregate federal commercial powers under both the commerce and the "necessary and proper" clauses could not very well be enlarged in substance as the Court prior to 1887 had already gone about as far as our language permits in giving broad definitions to the words of those clauses.

The importance of the Court's decisions concerning federal power lies, not in any change of general definitions, but in the application of these definitions to congressional legislation covering an ever-increasing list of subjects more or less directly related to commerce among the states. Among the subjects upon which the exercise of federal authority was sustained, are the terms upon which interstate transportation is rendered to shippers and passengers, the carriers' liability for loss or damage to interstate shipments, the physical agencies of interstate transportation both fixed and movable, and the management of carriers engaged in such transpor-

tation, including the purchase and sale of commodities, their transaction of business other than transportation and the relations between carriers and their employees. This does not mean that all legislation upon these subjects was sustained. A substantial relation between the legislation and the movement of interstate commerce was held to be requisite to its validity. In several instances the Court failed to find a sufficiently substantial connection to justify the exercise of federal power. Among the most noteworthy cases of this character were those refusing to sustain federal regulation of the liability of interstate carriers for injuries to employees not actually engaged in interstate transportation at the time of injury [1] and a federal statute prohibiting the discharge of employees of interstate carriers because of their membership in labor unions.[2] The Court, however, in many other cases sustained legislation which only indirectly regulated the movement of interstate transportation. Important illustrations of this are found in the decisions sustaining the Sherman Anti-Trust Act prohibiting combinations in restraint of trade among the states,[3] the commodities clause of Interstate Commerce Act prohibiting carrier ownership of commodities transported by them from state to state,[4] and the Adamson Act regulating wages paid by interstate carriers.[5]

The development of the doctrine that Congress, under the commerce clause, may legislate to foster and protect commerce between the states includes the decisions sustaining legislation authorizing the construction and operation of interstate railroads, creating corporations for this purpose, and granting the power of eminent domain to these corpora-

[1] *Employers' Liability Cases* (1908), 207 U. S. 463. See p. 128, *supra.*

[2] *Adair* v. *United States* (1908), 208 U. S. 161. See p. 130, *supra.*

[3] See pp. 124, 125, *supra.*

[4] See pp. 126-128, *supra.*

[5] *Wilson* v. *New* (1917), 243 U. S. 332. See p 132, *supra.*

tions. The most important extension of this doctrine appears in the Shreveport decision,[1] which sustained federal power to regulate rates for transportation wholly within one state when such regulation is needed to protect interstate commerce from discrimination. This decision was perhaps the most far-reaching in its implications of any rendered in the period discussed because it laid the foundation for the radical extension of federal power to intrastate transportation embodied in the Transportation Act of 1920.

In general it may be said that these decisions concerning federal power are consistent with the principle that the constitutional grant of power to regulate commerce between the states is "subject to no limitations save such as are prescribed in the Constitution" where a substantial connection exists between federal legislation and some part of interstate commerce. Even the prohibitions of the Fifth Amendment against the taking of liberty and property without due process of law do not prevent the Court from sustaining federal commercial regulations interfering with preexisting contracts or the future liberty of contract, when it believes that public necessity demands the regulations for the protection of interstate commerce. While the United States may not deprive a corporation of a state-granted charter or franchise without compensation, the contract rights arising therefrom are subject to federal regulation.

The Court in this period removed the chief obstacle to federal taxation of interstate carriers by deciding that a federal tax upon the operations of corporations created by the states as their agents to perform the public function of transportation is not an unconstitutional interference with state government; it reached this result by holding that public transportation is a *quasi* private business as distinguished

[1] *Houston, E. & W. T. Ry.* v. *United States* (1914), 234 U. S. 342. See pp. 139-142, *supra*.

from the essentially governmental functions of the state which the federal government may not tax.[1]

In defining state power with respect to interstate transportation, the decisions faced the difficulty of reconciling the necessary exercise of the state police and taxing powers to protect the health, safety, morals and general welfare of the public in matters of local concern, and to provide the revenues for local government, with the previously established doctrine that that part of commerce, which consists of the transportation of merchandise and passengers between the states, is a subject requiring uniformity of regulation which Congress alone can prescribe. In a great many cases, the latter doctrine prevailed and state police and taxing measures were held invalid. In others, the Court sustained state action and evaded the doctrine that Congress alone may regulate interstate transportation. This evasion was accomplished by adopting one of two expedients, that is, by holding either that some particular sub-division of the general subject of interstate transportation did not require nation-wide uniformity of regulation, and, therefore, was an exception to the general rule of exclusive congressional jurisdiction over interstate transportation, or by holding that the state action merely incidentally affected transportation between the states and was not a regulation of that subject.

In recognizing exceptions to the general rule of exclusive federal power, the Court opened a new door to the exercise of state power by sustaining federal legislation making a particular part of the subject of interstate transportation, namely interstate liquor traffic, subject to diversity of regulation by the states, although the Court had previously declared that the federal power over that part of interstate transportation was exclusive.[2] The Court itself also estab-

[1] *Flint* v. *Stone Tracy Co.* (1911), 220 U. S. 107. See p. 146, *supra.*

[2] See pp. 149-153, *supra.*

lished exceptions to the general rule by its decisions sustaining state regulation of the liability of carriers arising from interstate transportation and of the operation of ordinary highway ferries between the states.[1] But state regulation of even these subjects was not permitted to be so severe as to amount to what the Court would call a burden on interstate commerce; a license or occupation tax imposed upon the privilege of operating an interstate ferry was held to be such a burden.[2] And when Congress prescribed a uniform plan of regulation for a subject previously declared by the Court to permit of state regulation, such an Act of Congress was generally considered to amount to a declaration that the subject requires exclusive regulation by Congress so that state action with reference to it was held unconstitutional although not in actual conflict with the specific provisions of the federal law.

In passing upon the exercise of the state police power to protect the safety of persons within its borders, the Court consistently held that state laws reasonably designed to accomplish this end were not regulations of interstate commerce, and permitted a considerable degree of interference with the latter subject, such as prescribing the size of crews of interstate trains, and requiring licenses for the operation of motor vehicles of non-residents used on interstate journeys. The Court was almost as liberal in sustaining state legislation protecting health and morals including such measures as quarantine and inspection laws and the prohibition of Sunday trains. Some exceptions may be found such as the failure of the Court to sustain the exercise of state power to protect the health and morals of the community

[1] See pp. 156, 157, 164, *supra*.

[2] *Sault Ste. Marie* v. *International Transit Co.* (1914), 234 U. S. 333. See p. 157, *supra*.

when it refused to enforce a state statute prohibiting the transportation of intoxicating liquor into the state.[1]

When the exercise of state police power went beyond the field of safety, health and morals, and was directed to the public welfare and convenience, the Court gave much closer scrutiny to the resulting effects upon interstate commerce. It was particularly strict when the states sought to prescribe the terms and conditions upon which interstate transportation is furnished to passengers and shippers. Thus state regulation of interstate railroad rates in any form was absolutely prohibited, and with but few exceptions the Court refused to sustain state laws designed to secure a more convenient or adequate satisfaction of the public need for interstate transportation service. But when the state legislation sought to regulate the instrumentalities of interstate transportation, as distinguished from the interstate traffic itself, a very considerable degree of latitude was permitted if the bona-fide object of the legislation was the protection of the public convenience and welfare in matters of purely local concern. Practically the only restrictions placed upon state power to regulate intrastate charges for transportation were that such regulation must not violate lawful federal action taken to protect interstate commerce from discrimination and must not be confiscatory. In other matters of purely local concern, such as the regulation of intrastate service, or the regulation of interstate carriers for local purposes not directly connected with rates or service, the Court was more zealous to protect interstate commerce from interference. But even in such cases, state legislation was sustained where the effects upon interstate commerce were inconsiderable in comparison with the local necessity which prompted the legislation. The attitude of the Court is well illustrated by the

[1] *Bowman* v. *Chicago & N. W. Ry.* (1888), 125 U. S. 465. See p. 162, *supra*.

"train stop" cases;[1] when the reasonable requirements of intrastate transportation cannot be met without stopping interstate trains, they may be stopped by state order; but a train-stop order which exceeds the local needs and cannot conveniently be obeyed without stopping interstate trains is void.

While the states may thus regulate in a variety of ways the conduct of the business of interstate transportation, the decisions were unanimous in holding that they may neither deny the right of engaging in interstate commerce within their borders to any person or corporation, nor attach any conditions precedent to the exercise of that right. During this period, the Court took an additional step and departed from the long established rule that a state could dictate at will the terms upon which foreign corporations could engage in local business, by holding that the right to transact local business must not be made to depend upon the fulfillment of state requirements which in fact impose a burden on interstate commerce.

The Court continued to apply the principle that the states may charge reasonable fees as compensation for the expenses incurred in the lawful exercise of their police powers or for facilities furnished for interstate transportation. The most important application of this principle is found in the decisions sustaining laws requiring the payment of automobile license fees by non-residents using the highways of a state only on interstate journeys. Such fees may lawfully be imposed to reimburse the state for the necessary expenses both of policing the highways and of maintaining them in good repair.

In the field of state taxation, also, the work of the Court in this period consisted more in the application of prin-

[1] See pp. 173-175, *supra.*

[2] See pp. 182, 183, *supra.*

ciples previously established than in the development of new principles. The rule that a general property tax upon property within the state is a proper exercise of the state taxing power, even as applied to the instrumentalities of interstate commerce, was given a very broad application. It was extended to cover those intangible elements of value, such as good will, franchises, going concern value and the like, which derive their existence from the use of the property in interstate commerce and vary directly with the extent or profitableness of that use. It was further extended to support taxes which did not even take the form of property taxation, simply because they were levied in lieu of property taxes. While adhering to the principle that the jurisdiction of a state to assess property for taxation does not go beyond its own borders, the Court dealt in a very liberal manner with the problem of apportioning to the taxing state a part of the intangible property values resulting from the operation of a railroad in several states as a unified system. It sustained rough rule-of-thumb methods of apportionment which from a strictly technical standpoint make a state's assessment vary with elements of value outside of its border, but which in the long run result in a fairly equitable valuation of the property within the state. This is illustrated by the decisions supporting the mileage proportion basis of assessment under which the assessment of property within the state is reached by taking a percentage of the aggregate value of the entire system, the percentage factor representing the ratio of mileage in the taxing state to total mileage of the system.[1] The Court, however, refused to approve this method of assessment when special circumstances, such as a substantial difference between the traffic density in the taxing state and in other states, impeached its accuracy as a fair measure of property value within the state.

[1] See pp. 191-194, *supra*.

In considering state privilege and occupation taxes the Court steadfastly adhered to the rule that the business of interstate transportation must not be made the subject of such taxation. This rule, however, would give but scant protection to interstate transportation, if the states were permitted to evade it by imposing privilege or occupation taxes upon other subjects, such as the exercise of corporate franchises granted by the state or the transaction of intrastate business, without any scrutiny of the effects of such taxation upon interstate commerce. The Court accordingly gave close attention to the relation between state taxation of local privileges or occupations and interstate commerce, and further developed the principle that the states must not regulate interstate commerce under the guise of taxing local privileges. By far the most important application of this principle in the period considered in this chapter is found in the departure from the former rule that a state might impose any conditions it saw fit upon the exercise by foreign corporations of the privilege of transacting intrastate business. The departure was made in the decision that state conditions imposed upon the transaction of purely local business are unconstitutional if they result in fact in placing a burden upon interstate commerce.[1] In the case of corporations whose intrastate and interstate activities are not easily separable, such a burden was found to result from a state tax upon the privilege of engaging in intrastate business measured by a factor not directly taxable by the state, such as capital invested in property outside of the taxing state. The Court, however, continued to sustain state taxation of local privileges and occupations when its effects upon interstate commerce were not considered burdensome, as in the case of taxes imposed upon the exercise of the corporate franchises

[1] *Western Union Telegraph Co.* v. *Kansas* (1910), 216 U. S. 1. See pp. 192-203, *supra*.

of domestic corporations, even when measured by the capital of such corporations representing property outside of the taxing state, and reasonable lump-sum taxes upon the privilege of transacting local business.

A general income tax imposed by a state upon its residents, including domestic corporations, was declared to be a proper exercise of the state taxing power, although it included net income derived from transactions of interstate commerce; in so deciding, a distinction was made between the taxation of net income and of gross receipts, based upon the belief that the former is less likely so to diminish the profits from interstate commerce as to discourage its conduct.

So far as federal power is concerned, the result of the decisions discussed in this chapter was to confirm and strengthen the authority of Congress and its agencies to take almost any action having a substantial relation to the transportation of persons or property between the states and not amounting to a taking of liberty or property without due process of law. With respect to state power, the resulting situation was much more complicated. The attitude of the Court varied with the subject matter of state action. It recognized some forms of legislation as within the reserved powers of the states irrespective of their effect upon interstate commerce. In this group we find state regulation of charges for intrastate transportation, not in actual conflict with federal laws or orders, and state taxation of property or income, not discriminating against interstate commerce. Towards some other subjects, the attitude of the Court was to permit state legislation reasonably adapted to local needs, and not interfering with interstate transportation more than was required by the necessity of the local situations. This group includes state laws to protect the safety, health and morals of the public, and to provide adequate intrastate transportation service. To other forms of legislation, the

rule that Congress has exclusive power to regulate interstate transportation was considered applicable, and state action was prohibited with few exceptions. In this group are found direct regulation of the charges for interstate transportation and the service rendered therein, direct taxation of the business of transporting persons or commodities between the states, and indirect taxation measured by the amount of such business or the gross receipts therefrom.

This brings the discussion down to the Transportation Act of 1920, which embodied a new legislative policy of fostering and protecting interstate commerce by building up the earning capacity and credit of interstate carriers. The execution of this policy gave rise to new problems in the relation of state and federal powers which will be considered in the following chapter.

CHAPTER IV

JUDICIAL INTERPRETATION OF FEDERAL AND STATE POWERS. 1920-1927

THIS chapter will consider United States Supreme Court decisions subsequent to the Transportation Act of 1920. Prior to this legislation, there had been little direct conflict between state and federal authorities concerning the interpretation of their respective powers over interstate carriers. It is true that in a multitude of cases in the United States Supreme Court, federal legislation had been challenged as infringing upon the reserved powers of the states, and state legislation had been attacked as a violation of the exclusive power of Congress to regulate interstate transportation. The attack, however, usually was made by carriers or others who wished to escape the burden of the challenged legislation, and not by the sovereignty whose power was alleged to have been infringed. There are, of course, exceptions to this statement, but even in the Shreveport cases, where the Interstate Commerce Commission directly invaded the recognized field of state action by making an order regulating charges for intrastate transportation in Texas, the state of Texas was not a party to the litigation. In general, the protection of state and federal authority from usurpation was left to private litigants, and the state and national governments were seldom found arrayed against each other in the United States Supreme Court. This was because actual collisions between the laws of the states and of the United States were relatively unimportant so far as interstate carriers were concerned.

With the Transportation Act of 1920 this situation was changed. Under the authority conferred by this legislation, the Interstate Commerce Commission issued many orders regulating the general level of the intrastate rates of interstate carriers and otherwise affecting their conduct of intrastate transportation. These orders were frequently in direct conflict with state statutes or the orders of state commissions. We, therefore, find that the state and federal governments joined issue with each other before the United States Supreme Court, and that there was a very determined effort on the part of the states to curb the extension of federal authority to intrastate transactions. The existence of direct conflict between the states and the nation is indicated by the titles of two important cases of this period, *New York* v. *United States,*[1] and *Colorado* v. *United States.*[2] The decisions in these and other cases upholding federal intervention in matters previously left to state regulation are the outstanding development of the period beginning in 1920.

As in the preceding chapters, attention will first be directed to the decisions concerning federal power. Before turning to the more radical extensions of federal control over interstate carriers, which were sustained by the United States Supreme Court in the period now considered, brief references will be made to a few decisions which further applied principles that had received recognition prior to 1920.

It has already been shown that the Court had decided that federal commercial powers embrace the regulation of the distribution among shippers of all the equipment owned by interstate carriers.[3] Such regulation was usually applied to prevent discrimination among shippers in the distribution of the available car supply in times of car shortage. The Inter-

[1] (1922), 257 U. S. 591.

[2] (1926), 271 U. S. 153.

[3] See p. 122, *supra*.

state Commerce Commission, however, went beyond the mere protection of the shippers' rights to a just and equitable distribution of the available car supply, and by means of its power to control the use of the equipment of interstate carriers, it regulated the distribution of coal moving in interstate commerce among the consumers thereof according to the urgency of their needs for fuel. It did this by establishing an order of preference for the distribution of coal cars among shippers according to the purpose for which the coal shipments were to be used, including provisions giving priority to the requirements of public utilities and hospitals over those of certain manufacturers. This exercise of federal authority was sustained by the Court.[1] It is thus clear that the federal power to regulate interstate carriers is not limited to securing adequate, reasonable and non-discriminatory transportation services for the public, but may also be used as an instrument to control the distribution of an essential commodity moving in interstate commerce among the consumers thereof. Another illustration of the extent to which the Court will uphold federal power to regulate the distribution of the available car supply is found in *The Assigned Car Cases*.[2] These cases sustained an order of the Interstate Commerce Commission which prohibits any railroad engaged in interstate commerce from placing for loading at any coal mine more than that mine's ratable share of all cars available for use in the district in which it is located, and which requires that, in determining how many cars are available in the district, the carriers must count cars assigned by them or by foreign railroads for transportation of fuel for use of the road owning the cars, and must also count cars owned

[1] *Avent* v. *United States* (1924), 266 U. S. 127; *United States* v. *Koenig Coal Co.* (1926), 270 U. S. 512; *United States* v. *Michigan Portland Cement Co.* (1926), 270 U. S. 521.

[2] U. S. Sup. Ct., May 31, 1927.

by private shippers assigned to the service of the owners. Under the terms of this order, a railroad or private shipper may not use its own cars to obtain its own fuel from a mine which is under contract to supply that fuel and is capable of producing it, but which has already received its ratable proportion of the available car supply in the district. With respect to railroad-owned cars, intended for the transportation of the owner's fuel, the power of the Commission to establish rules for equitable distribution had been previously sustained.[1] With respect to the cars owned by private shippers, it was contended that the order was invalid as a taking of private property without due process of law. The Court answered this argument by stating that Congress may exclude privately owned cars from interstate railroads and may therefore prescribe the conditions on which they may be used. A further objection to the order was made on the ground that the Commission, under the guise of regulating the instrumentalities of interstate commerce, was seeking to equalize industrial fortune and opportunity by placing shippers who relied solely upon railroad-owned cars upon an equality with those who had the foresight and initiative to provide themselves with cars for their own use. To this the Court replied that the object of the order was not to equalize opportunity but to prevent unjust discrimination and to improve service.

The basis of sustaining federal power to regulate the use of the equipment of interstate railroads for all purposes is the difficulty of separating the interests of interstate and intrastate shippers in its use. The same principle was followed by the Court in a recent decision which sustained the power of the Interstate Commerce Commission to require the New York Central Railroad to furnish transportation from

[1] *Interstate Commerce Commission* v. *Illinois Central R. R.* (1910), 215 U. S. 452. See p. 123, *supra*.

its lines and connections to the terminal of the Erie Barge Canal at Buffalo under the provisions of Section 6(13) of the Interstate Commerce Act authorizing the Commission to establish physical connection between the lines of a rail carrier and the dock of a water carrier and to prescribe the terms and conditions upon which the connecting tracks shall be operated.[1] In this case it was held that federal jurisdiction extends to the entire current of commerce flowing through the terminal, although intrastate in part, because interstate and intrastate transactions are so interwoven that the regulation of the latter is incidental to and inseparable from the regulation of the former.

Two decisions of this period further extend the doctrine of the Shreveport cases [2] that the federal government has power to regulate the movement of purely intrastate traffic in order to prevent discrimination against interstate traffic in competition therewith, and in so doing may suspend the operation of the laws of the states in which such traffic moves. In one of these cases, it was held that the Interstate Commerce Commission may authorize carriers to limit their liability for intrastate shipments notwithstanding the provisions of a state statute prohibiting the limitation of liability.[3] This case arose from the provisions of the Cummins amendment of 1916,[4] which authorized carriers with the approval of the Interstate Commerce Commission to limit their liability for loss or damage to interstate shipments to the declared value of the shipment in cases in which the rates for transportation are dependent upon such declared value. An order of the Interstate Commerce Commission required that interstate carriers make a similar limitation of liability on shipments moving wholly within the state of Texas in

[1] *United States* v. *New York Central R. R.* (1926), 272 U. S. 457.

[2] See pp. 139-142, *supra*.

[3] *Lancaster* v. *McCarty* (1925), 267 U. S. 427.

[4] 39 Stat. L. 441.

order to prevent discrimination against interstate shippers. The Court decided that the conflict between the provisions of the Texas statute, prohibiting such limitation of liability, and the order of the Interstate Commerce Commission, can only be settled by recognition of the supremacy of the federal authority. It is clear that, all other conditions being equal, an interstate shipper is at a disadvantage as compared with his local competitor if the amount of his recovery for loss or damage to his goods is limited, while that of his competitor is unlimited. The other extension of the Shreveport doctrine is found in a case in which the Court held that the Interstate Commerce Commission has power to order an increase of the intrastate passenger fares of an interurban electric railway to prevent discrimination against interstate commerce.[1] This decision is noteworthy because it marks the extension of this form of federal regulation to an agency of transportation which was neither a part of a steam railroad system nor engaged in the general transportation of freight, and, therefore, enters a field in which intrastate transportation is usually regarded as subject only to state regulation.

The decisions sustaining a radical extension of federal control over interstate carriers are those which arose from the administration of the new policy of federal regulation embodied in the Transportation Act of 1920. In the words of Mr. Justice Brandeis:

> Transportation Act, 1920, introduced into the federal legislation a new railroad policy. . . . Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to insure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obliga-

[1] *United States* v. *Village of Hubbard* (1925), 266 U. S. 474.

tions, new machinery, were created. The new provisions took a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service.[1]

Chief Justice Taft also briefly and cogently describes the new policy:

The Transportation Act adds a new and important object to previous interstate commerce legislation, which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the [Interstate Commerce] Commission.[2]

The key note of this new policy is struck in Section 15a of the Interstate Commerce Act as amended by the Transportation Act of February 28, 1920.[3] This is the section which popularly masquerades under the false name of the "guaranty" section. It is in reality merely the statement of a general rule of rate making to be followed by the Interstate Commerce Commission with a view to securing *"as nearly as may be"* a reasonable remuneration for transportation services rendered. If this desired result is not accomplished by reason either of errors of judgment of the Commission or of circumstances beyond governmental control, it is the carriers and not the government that must sustain the loss. Thus there is no element of guaranty in the section.

[1] *New England Divisions Case* (1923), 261 U. S. 184, 189.

[2] *Dayton-Goose Creek Ry. Co.* v. *United States* (1924), 263 U. S. 456, 478.

[3] 41 Stat. L. 488.

The situation which led to the enactment of this section in 1920 may be briefly stated. The shipping and travelling public had suffered since 1916 from car shortage, embargoes, priority orders, congested terminals, delayed transportation and the like to such an extent that they had become convinced that the railways of the United States, regarded as a national system, were becoming more and more incapable of rendering adequate transportation service to the country as a whole and that the economic and industrial prosperity of the nation depended upon drastic relief. Popular dissatisfaction with certain aspects of government operation during the war had strengthened the conviction that this relief must be obtained under a policy of regulated private operation and not of government operation. The two prime requisites of such relief were increased transportation facilities and greater co-ordination of effort. Increased transportation facilities demand capital expenditure. Capital expenditure depends upon credit. Credit cannot exist without prospective earning capacity; therefore Section 15a was enacted to prescribe a rate-making policy designed to give the investing public some assurance that capital invested in the transportation industry would be reasonably remunerative.

The rule of Section 15a is that the Interstate Commerce Commission shall initiate, modify, establish or adjust rates so that the interstate carriers as a whole in each of several rate groups to be designated by the Commission will, " under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation ". This fair return to which the Commission must direct its efforts is to be not merely upon the *segregated* value of the carriers' property

apportionable to *interstate* transportation, but upon the *aggregate* value of all property used in transportation, including property value apportionable to intrastate transportation. Thus the federal government concerns itself just as much with protecting a fair return on the entire value of a New York Central multiple unit car which carries intrastate commuters between Yonkers and Grand Central as on the value of the locomotives of the Twentieth Century Limited. It would have been entirely possible for Congress to have directed the Commission to adjust rates to provide a fair return from interstate receipts on the value of the carriers' property properly apportionable to the service of interstate commerce. Such an apportionment is an extremely complicated problem of accounting, but is possible; indeed it has been made in rate cases to determine whether state rate reductions deprived carriers of property without due process of law.[1] Congress, however, did not see fit thus to restrict this rule of rate making; if it had not concerned itself with a fair return on the value of all property of interstate carriers whether used in interstate or state transportation, it is quite probable that a direct conflict between federal and state authorities would not have arisen; it is also possible that the carriers would not have been able to provide the facilities to handle an average of over one million car-loads of freight a week in the year 1926 without substantial car shortage.

Immediately after Section 15a became a law, federal operation of the railroads ended, and the roads were returned to their private owners with a rate structure utterly inadequate to provide any return at then existing cost levels. To be sure the carriers were given a breathing space of six months within which they were guaranteed (this was a real guaranty) a net income equivalent to the rental they had received from the government during federal control. But

[1] See *Minnesota Rate Cases* (1913), 230 U. S. 352, 436 *et seq.*

it was clearly the duty of the Interstate Commerce Commission to busy itself at once with a rate adjustment, carrying out the instructions of Section 15a, which could be put into effect before the expiration of the guaranty period on August 30th, 1920.

The Commission, therefore, instituted a general investigation into the rate situation in which they divided the country for rate-making purposes into four groups, Eastern, Southern, Western and Mountain-Pacific. This investigation was known as *Ex Parte 74,* and resulted in an order effective August 26, 1920, four days before the expiration of the guaranty period, raising all interstate freight rates in each group by percentages which varied as between the different groups, but not within each group.[1] The order also increased all interstate passenger fares twenty per cent, imposed the fifty per cent Pullman surcharge, and made other less important increases such as in the charges for excess baggage, and milk and cream transportation. By its terms the order applied only to interstate charges, but it was perfectly clear that the Commission considered these percentages of increase as representative of the amount by which all rates, state and interstate, must be increased to provide the fair return on aggregate property value contemplated by Section 15a.

Passing for the moment the effects of Section 15a on intrastate transportation, attention will be directed to two new phases of the regulation of interstate commerce which arose from this legislation, and both of which were sustained by the Court. It is improbable that any order, such as the one in *Ex Parte 74,* made for a rate group as a whole and without adjustment to the respective requirements of the individual roads within the group, will produce the same rate of return upon the railway property of each carrier in the group. If,

[1] 58 I. C. C. 220.

therefore, the Commission achieved its purpose of establishing a fair return upon the aggregate value of all the railway property in the group, the earnings of the stronger roads would, in the absence of any other regulatory action, exceed a fair return upon their property, while the weaker roads might require still further financial assistance. There are two remedies for this situation provided by the amended Interstate Commerce Act, namely, Section 15(6) giving the Commission authority to determine the divisions of joint rates, fares and charges between the participating carriers and Section 15a(5) to (18) inclusive, authorizing the recapture of part of the net earnings of particular carriers in excess of six per cent of the value of their railway property used in the service of transportation.

The authority of the Commission to prescribe the divisions of joint rates was not new in 1920. It had first been created by the Mann-Elkins Act of June 18, 1910.[1] The constitutionality of its use for the purpose of establishing just and equitable divisions on the basis of the services rendered by the respective carriers was not disputed. Subsequent to the Transportation Act of 1920, however, this power of prescribing the divisions of joint rates was used by the Interstate Commerce Commission for an entirely new purpose, that is, to eke out the meagre earnings of weak carriers of a rate group by giving them a larger share of the divisions at the expense of their stronger connections. Such exercise of federal power was contested before the United States Supreme Court in *The New England Divisions Case* in 1923.[2] This case arose from an order of the Interstate Commerce Commission which in substance directed that in the divisions of joint rates participated in by carriers of the New England, Trunk Line and Central Freight Association

[1] 36 Stat. L. 539, 551, 552.

[2] 261 U. S. 184.

territories, the share of the New England lines should be increased fifteen per cent, and the share of the lines west of the Hudson River should be correspondingly diminished.[1] The basis of the Commission's action was the urgent necessity of increasing the net income of the New England lines, some of which were in a very precarious financial condition. The order was contested by the Trunk Line and Central Freight Association carriers upon several grounds, of which the most important, from our standpoint, was that the order was void because its purpose was not to establish just and equitable divisions as between the carriers on the basis of the respective service rendered by them, but was merely to take the property of the more prosperous roads to relieve the financial needs of the New England lines. This, it was contended, was a taking of property without due process of law in violation of the Fifth Amendment. The Court, however, sustained the order as a proper exercise of federal commercial power in aid of the declared policy of the Transportation Act of 1920 to provide an adequate transportation system. In the opinion of the Court, Mr. Justice Brandeis links the New England Divisions order with the new federal transportation policy as follows:

> It was necessary to avoid unduly burdensome rate increases and yet secure revenues adequate to satisfy the needs of the weak carriers. To accomplish this two new devices were adopted: the group system of rate making and the division of joint rates in the public interest. Through the former, weak roads were to be helped by recapture from prosperous competitors of surplus revenues. Through the latter, the weak were to be helped by preventing needed revenue from passing to prosperous connections. . . . The provision concerning divisions was, therefore, an integral part of the machinery for distributing the funds expected to be raised by the new rate fixing sections. It was, indeed, indispensable.[2]

[1] (1922), 66 I. C. C. 196.

[2] 261 U. S. at 191.

The constitutionality of the recapture provisions of Section 15a was also contested, and in *Dayton-Goose Creek Railway* v. *United States,* decided in 1924, the Court sustained this legislation.[1] In opposition to the recapture of part of the earnings in excess of six per cent, it was argued that to deprive a carrier of its profit upon transportation furnished at rates found by the Interstate Commerce Commission to be just and reasonable, was to take its property without due process of law. The Court, however, pointed out the necessity of maintaining uniform rates for all shippers and that such rates, as applied to some carriers, would result in only a fair return, while as applied to others, they would produce excessive profits. It distinguished between the reasonableness of one rate or a class of rates and the reasonableness of the general level of all the rates received by the carrier.

Chief Justice Taft in the opinion said:

> By the recapture clauses Congress is enabled to maintain uniform rates for all shippers and yet keep the net returns of railways, whether strong or weak, to the varying percentages which are fair respectively for them. The recapture clauses are thus the key provisions of the whole plan. . . .
>
> The reduction of the net operating return provided by the recapture clause is, as near as may be, the same thing as if rates had all been reduced proportionately before collection.[2]

Let us turn now to the effect of Section 15a upon intrastate transportation. The order in *Ex Parte 74* was immediately followed by a nation-wide movement of the carriers to obtain authority for similar increases in intrastate rates. In some instances the railroads confined their case before state commissions to the presentation of the Interstate Commerce Commission order and presented no other

[1] 263 U. S. 456.

[2] 263 U. S. at 480, 483.

evidence justifying the requested increases. The responses of the state commissions to these applications varied. Some commissions granted the increases in full, others in part, and some refused relief entirely. The hands of some commissions were tied by state statutes fixing maximum rates which would be violated by percentage increases equal to those ordered by the Interstate Commerce Commission. The net result was that the railroads with respect to a large body of state rates failed to obtain state authority to make percentage increases corresponding to the interstate increases.

The railroads, therefore, appealed to the Interstate Commerce Commission for relief, and the latter body asserted its mastery of the situation in no uncertain terms. It said in substance: The transportation of freight and passengers within the borders of any state at general rate levels below the levels established by the Commission for interstate commerce is a discrimination against interstate commerce as a whole and must cease; you, the carriers, must remove this discrimination at once by increasing your intrastate rates to general levels corresponding to those authorized by us for interstate commerce. The Commission consistently and ruthlessly carried out this policy in a series of orders regulating intrastate rates in twenty-five different states contrary to state statutes or the orders of state regulatory boards. In taking this action the Commission relied not only on Section 15a, but also on Section 13(4), which as amended in 1920 specifically empowered it to regulate state rates upon a finding of discrimination against interstate commerce, "the law of any state or the decision or order of any state authority to the contrary notwithstanding".[1]

The excitement among state authorities was intense. They believed that these new orders, if sustained by the courts, would destroy state power to regulate state rates.

[1] 41 Stat. L. 484.

They denied that Congress had authorized the Interstate Commerce Commission to take such action; furthermore, they denied the constitutional right of Congress to confer such authority on the Commission; and, with the courage of their convictions, some of the states proceeded to enforce their lower scale of local rates.

The railroads, confronted with the conflicting commands of two masters, resorted to the courts to restrain the enforcement of state laws and orders contrary to the orders of the Interstate Commerce Commission. This squarely raised the issue of the existence of federal power to regulate wholly intrastate rates in order to provide sufficient revenues to maintain an adequate national system of transportation. This power was sustained in *Railroad Commission of Wisconsin* v. *Chicago, Burlington and Quincy Railroad* in 1922.[1] This case arose from an order of the Interstate Commerce Commission made on November 27, 1920,[2] directing the carriers in Wisconsin to increase their fares for passenger transportation wholly within Wisconsin to the same rate per mile as that directed for interstate fares by the order in *Ex parte 74*. The Wisconsin Railroad Commission had previously authorized an increase of intrastate freight rates proportionate to the increase in interstate freight rates in the Western group, but had refused to take similar action with respect to passenger fares because of a state statute prescribing two cents a mile as the maximum. Thereupon the Interstate Commerce Commission found undue, unjust and unreasonable discrimination against persons traveling in interstate commerce and against interstate commerce as a whole, and ordered the horizontal increase of all intrastate passenger fares on railroads also engaged in interstate commerce to remove this discrimination. When the matter was pre-

[1] 257 U. S. 563.

[2] *Wisconsin Passenger Fares*, 59 I. C. C. 391.

sented to the United States Supreme Court two questions were considered: first, whether the intrastate passenger fares worked undue prejudice against persons in interstate commerce, such as to justify a horizontal increase of them all, and second, whether the intrastate fares were a discrimination against interstate commerce as a whole which it was the duty of the Commission to remove. On the first question, the Court took the position that an unjust discrimination against persons in interstate commerce existed only with respect to intrastate fares to and from points near the border line. As this discrimination could be removed without disturbing existing fares between interior points, the Court decided that a sweeping horizontal increase of all intrastate fares could not be sustained on the ground of discrimination against interstate passengers.

The decision sustaining the federal order was based entirely upon the existence of a rate situation which constituted discrimination against interstate commerce as a whole. The Interstate Commerce Commission had found that a rate of 3.6 cents per mile for passenger transportation was necessary to produce the fair return contemplated by Section 15a. The rate fixed by Wisconsin law was only 2 cents per mile. If the Wisconsin law were enforced, passengers traveling wholly within Wisconsin would, therefore, pay less than their fair share of the revenues necessary to produce a fair return on the railway property. This, in the opinion of the Court, was a discrimination against interstate commerce as a whole.

The federal power to remove discriminations against interstate commerce arising from the enforcement of lower intrastate rates had previously been exercised only to protect the interstate commerce of particular persons or localities, and it was argued that Congress had not authorized the Commission to make a broader application of this power. The authority to do so was found by the Court in the amend-

ments made by the Transportation Act of 1920 to Section 13(4) of the Interstate Commerce Act.[1] By this amendment the Act authorizes the Commission to remove not only "any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand" but also "any unreasonable or unjust discrimination against interstate or foreign commerce". The Court pointed out that the latter provision would be tautological if it did not extend the Commission's power to cases other than those in which discrimination against particular persons or localities was found.

Section 13(4), as amended, further provides that the orders of the Interstate Commerce Commission removing any such discrimination shall be observed by the carriers, "the law of any State or the decision or order of any State authority to the contrary notwithstanding". The decision in the *Wisconsin* case fully sustained the constitutionality of the provisions of Sections 15a and 13(4) of the amended Interstate Commerce Act as administered by the Interstate Commerce Commission to override the Wisconsin statute. This case, therefore, established the proposition that Congress, through the Interstate Commerce Commission, has power to regulate intrastate rates contrary to the provisions of state law in order to compel intrastate traffic to pay its fair share of the cost of maintaining an adequate national system of transportation.[2] The basis of this position is the fact that the same railroads must be used for both interstate and intrastate transportation, and that, therefore, the failure to receive adequate compensation for the intrastate service, places an unjust burden upon interstate commerce. As stated by Chief Justice Taft in the *Wisconsin* decision:

[1] 41 Stat. L. 484.

[2] *Accord, New York* v. *United States* (1922), 257 U. S. 591.

Commerce is a unit and does not regard state lines, and while, under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the nation, cannot exercise complete, effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of state authority or a violation of the proviso [of the Interstate Commerce Act that the Commission is not to regulate traffic wholly within a state.] . . .

Congress in its control of its interstate commerce system, is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonably compensatory return for all the work it does. The states are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business. Congress, as the dominant controller of interstate commerce, may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing state work. The affirmative power of Congress in developing interstate commerce agencies is clear. . . . *In such development, it can impose any reasonable condition on a state's use of interstate carriers for intrastate commerce it deems necessary or desirable.*[1] This is because of the supremacy of the national power in this field.[2]

The *Wisconsin* decision is carefully limited to sustaining federal authority to regulate the general level of intrastate rates as a whole. It does not authorize federal regulation of the interrelations of particular intrastate rates. These may be adjusted by the states without federal interference so long as the process does not result in discrimination against interstate commerce. The action of the Interstate Commerce

[1] Italics mine.

[2] 257 U. S. at 588-590.

Commission should be directed to substantial disparity which operates as a real discrimination against and obstruction to interstate commerce and must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce.[1]

The Court sustained a further extension of the power of Congress to regulate intrastate transportation in aid of its policy of providing an adequate national system of transportation by a decision upholding the validity of the provisions of Section 15a of the Interstate Commerce Act for the recapture of part of the net earnings of interstate railroads in excess of six per cent of the value of their railway property even as applied to earnings derived from intrastate revenues.[2] This might be said to go beyond the necessity of protecting the earning power and credit of interstate carriers, because the capacity of the roads to meet the requirements of interstate transportation could by no stretch of the imagination be impaired by allowing them to retain excess profits from their intrastate business. The Court, however, found a sufficient connection between the recapture of intrastate earnings and interstate commerce to justify this exercise of federal power. Its position is stated by Chief Justice Taft:

The third question for our consideration is whether the recapture clause, by reducing the net income from intrastate rates, invades the reserved power of the states and is in conflict with the Tenth Amendment. In solving the problem of maintaining the efficiency of an interstate commerce railway system, which serves both the states and the nation, Congress is dealing with a

[1] 257 U. S. at 590. See also *Dayton-Goose Creek Ry.* v. *United States* (1924), 263 U. S. 456, 482, 483.

[2] *Dayton-Goose Creek Ry.* v. *United States, supra.*

unit in which state and interstate operation are often inextricably commingled. When the adequate maintenance of interstate commerce involves and makes necessary on this account the incidental and partial control of intrastate commerce, the power of Congress to exercise such control has been clearly established. [Citing cases.] The combination of uniform rates with the recapture clauses is necessary to the better development of the country's interstate transportation system as Congress has planned it. The control of the excess profit due to the level of the whole body of rates is the heart of the plan. To divide that excess and attempt to distribute one part to interstate traffic and the other to intrastate traffic would be impracticable and defeat the plan. This renders indispensable the incidental control by Congress of that part of the excess possibly due to intrastate rates which if present is indistinguishable.[1]

The power of the federal government to regulate intrastate transportation is not confined to the rates charged and the earnings therefrom. It can impose any reasonable condition on a state's use of interstate carriers for intrastate commerce it deems necessary or desirable for developing interstate commerce.[2] Thus the Court has sustained the power of Congress to require interstate railroads proposing to construct a branch or extension of their system wholly within one state to obtain from the Interstate Commerce Commission a certificate that public necessity and convenience requires such additional transportation facilities.[3] The purpose of this requirement is two-fold; first, it is used as a means to prevent an interstate railroad from impairing its financial capacity to render adequate interstate transportation

[1] 263 U. S. at 485.

[2] *Wisconsin* v. *Chicago, B. & Q. R. R.* (1922), 257 U. S. 563, 590.

[3] *Railroad Commission* v. *Southern Pacific Co.* (1924), 264 U. S. 331; *Texas and Pacific Ry.* v. *Gulf, C. & S. F. Ry.* (1926), 270 U. S. 266; *Alabama and Vicksburg Ry.* v. *Jackson and Eastern Ry.* (1926), 271 U. S. 244.

service on its existing lines by undertaking the operation of new lines at a loss or without adequate return upon the capital invested therein; second, it is used to protect existing lines adequately serving the territory in which it is proposed to construct a branch or extension of a competing road from the disastrous financial effects of unnecessary competition. Both of these objects are consistent with and a part of the new legislative policy of the Transportation Act of 1920, that is, they are appropriate means of protecting the national transportation system by sustaining the earning power and credit of the various railroads which constitute that system.[1]

A similar federal power sustained by the Court is that of authorizing the abandonment of a part of the lines of an interstate carrier even when the part proposed to be abandoned lies wholly within one state.[2] Federal authority to authorize the abandonment of the use of such a line for interstate transportation could hardly be disputed, but this power as exercised by the Interstate Commerce Commission goes much further and is used to support the abandonment of such an intrastate branch for all purposes, including the movement of wholly intrastate traffic. The grounds for sustaining such action are stated by Mr. Justice Brandeis as follows:

Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce. Expenditures in the local interest may be so large as to compel the carrier to raise reasonable interstate rates, or to abstain from making an appropriate reduction of such rates, or to curtail interstate service, or to forego facilities needed in interstate commerce. Likewise, excessive local expenditures may so weaken the finan-

[1] For discussion of the effect of this legislation upon state powers, see pp. 330-333, *infra*.

[2] *Colorado* v. *United States* (1926), 271 U. S. 153.

cial condition of the carrier as to raise the cost of securing capital required for providing transportation facilities used in the service, and thus compel an increase of rates. Such depletion of the common resources in the local interest may conceivably be effected by continued operation of an intrastate branch in intrastate commerce at a large loss. . . .

This railroad, like most others, was chartered to engage in both intrastate and interstate commerce. The same instrumentality serves both. The two services are inextricably intertwined. The extent and manner in which one is performed, necessarily affect the performance of the other. Efficient performance of either is dependent upon the efficient performance of the transportation system as a whole. . . .

Because the same instrumentality serves both, Congress has power to assume not only some control, but paramount control, insofar as interstate commerce is involved. It may determine to what extent and in what manner intrastate service must be subordinated in order that interstate service may be adequately rendered. The power to make the determination inheres in the United States as an incident of its power over interstate commerce.[1]

In the case from which the foregoing quotation is taken, the state of Colorado contested an order of the Interstate Commerce Commission authorizing the complete abandonment for all purposes, including intrastate commerce, of a branch of the Colorado and Southern Railroad which lay wholly within the state of Colorado. Among other grounds for disputing the validity of the federal order, the state urged that the Interstate Commerce Commission had not made the necessary findings to establish a substantial connection between the abandonment of intrastate traffic on the branch and interstate commerce. It was contended that such an order was not within the power of the Commission because it had not found that the continued operation of the branch

[1] 271 U. S. at 163-165.

would cause discrimination against interstate commerce or that the entire intrastate Colorado business would not earn a fair return on the property used in conducting that business even if the railroad were required to operate this branch at a loss. To this the Court replied that the sole test of the validity of the federal order is that abandonment is consistent with public necessity and convenience as determined by the Commission with regard for the needs of both interstate and intrastate commerce. In the words of Mr. Justice Brandeis:

> Whatever the precise nature of these conflicting needs, the determination is made upon a balancing of the respective interests—the effort being to decide what fairness to all concerned demands. In that balancing, the fact of demonstrated prejudice to interstate commerce and the absence of earnings adequate to afford reasonable compensation are, of course, relevant and may often be controlling. But the act does not make issuance of the certificate dependent upon a specific finding to that effect.[1]

The Court thus clearly takes the position that the federal government, to strengthen the financial position of an interstate railroad, may authorize the abandonment of a branch for purely intrastate traffic even when no discrimination against interstate commerce is shown, and the returns earned by the carrier from its intrastate business as a whole are justly compensatory. Under these circumstances it is difficult to see how interstate commerce is sufficiently affected to justify the exercise of federal power. It is true that the continued operation of the branch at a loss to that extent reduces the net earnings of the railroad, and, therefore, affects its capacity to render interstate transportation service. If, however, the earnings from its intrastate traffic adequately compensate the railroad for the use of its property within the state, including the branch in question, any necessity for

[1] 271 U. S. at 169.

reduction of operating costs must arise from the inadequacy of other revenues. In that case, the capacity of the railroad to render adequate interstate transportation service should be protected, not by compelling further economies in intrastate operations in the state where the branch is located, but by placing its interstate business or its business in other states upon an adequately remunerative basis. To do otherwise is to violate the principle that each class of traffic should pay its fair share of the joint expenditures incurred in rendering all classes of service.[1]

Federal power, however, does not extend to authorizing the abandonment of the intrastate business of a railroad located entirely in one state and authorized by the Interstate Commerce Commission to abandon all of its interstate business.[2] Since such a railroad has ceased to be an instrumentality of interstate commerce, its continued operation solely in intrastate commerce can have no possible effect upon interstate transportation. No railroad engaged in interstate commerce is burdened by or compelled to make good any shortage in the earnings of such an intrastate line. The authority of the federal government to authorize the abandonment of a line wholly within one state, therefore, applies only when that line is a part of a railroad which will continue to engage in interstate transportation on other portions of its railway property.

The federal government also has power to affect the intrastate operations of interstate railroads by regulating the issue of securities to obtain the necessary capital for such operations.[3] The existence and exercise of this federal power to

[1] See *Smyth* v. *Ames* (1898), 169 U. S. 466, 541; *Minnesota Rate Cases* (1913), 230 U. S. 352, 435. See p. 171, *supra*.

[2] *Texas* v. *Eastern Texas R. R.* (1922), 258 U. S. 204.

[3] *Railroad Commission* v. *Southern Pacific Co.* (1924), 264 U. S. 331. See also *Colorado* v. *United States* (1926), 271 U. S. 153, 165.

regulate the issue of securities was one of the grounds for holding that a state has no power to require the construction of a union passenger terminal involving large capital expenditure for which the sale of new securities would be necessary.[1]

These various forms of federal regulation of the intrastate business of interstate railroads are constitutional even in cases in which the terms of the federal orders are in direct violation of the contract obligations of the railroads as embodied in the state charters under which they operate. Thus the Court sustained an order of the Interstate Commerce Commission requiring the New York Central Railroad to charge 3.6 cents per mile for passenger transportation wholly within the state of New York notwithstanding the fact that it was under charter obligation to carry passengers between Albany and Buffalo for two cents a mile.[2] The state urged as objections to the enforcement of the federal order that it impaired the obligation of contracts in violation of Article I, Section 10 of the United States Constitution, and that it deprived the people of the State of New York of property without due process of law. In answer to these objections the Court pointed out that the constitutional prohibition against impairing the obligation of contracts applies only to state and not to federal action, and that " anything which directly obstructs and thus regulates that commerce which is carried on among the states, whether it is state legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce ".[3] In the *Colorado* case previously mentioned as sustaining federal power to authorize the abandonment of

[1] *Railroad Commission* v. *Southern Pacific Co., supra.*

[2] *New York* v. *United States* (1922), 257 U. S. 591.

[3] The Court quoted this from *Addyston Pipe and Steel Co.* v. *United States* (1899), 175 U. S. 211, 230.

an intrastate branch,[1] the state's main contention was that the railroad company had assumed the obligation of providing intrastate service on every part of its road within the state, and that the Interstate Commerce Commission had no power to authorize the company to continue to enjoy the privilege of operating other parts of its road in Colorado without carrying out its charter obligations with respect to the abandoned branch. The Court stated that this argument rests upon a misconception of the nature of the power exercised by the Commission in authorizing the abandonment.

> The certificate issues, not primarily to protect the railroad, but to protect interstate commerce from undue burdens or discrimination. The Commission by its order removes an obstruction which would otherwise prevent the railroad from performing its federal duty.[2]

These decisions made it clear that the charter obligations of interstate railroads to perform intrastate service are subordinate to the federal power to foster and protect interstate commerce.

With respect to the effect of the United States Constitution upon state power to regulate and otherwise affect interstate transportation, the Supreme Court since 1920 has continued to develop and apply the principles previously established by it. The process of judicial interpretation has not been as liberal to state as to federal power. Many decisions have further restricted the capacity of the states to apply their legislation to interstate commerce and its instrumentalities. But it cannot be said that the present trend of judicial decision is predominantly restrictive so far as the states are concerned. The Court has recently sustained state statutes in several decisions which confirm the extension of state power to newer forms of legislation which have developed

[1] See p. 240, *supra*.

[2] (1926), 271 U. S. 153, 162.

with the modern tendency to broaden the scope of governmental activity and with the increased need for revenue resulting therefrom. This recognition of state power is particularly noteworthy in the field of taxation; a very fruitful source of revenue is made available to the states by the cases which uphold the use of the net income of persons and corporations engaged in interstate commerce, both as a subject of state taxation and as a measure of state property, privilege and occupation taxes.

Among the fundamental rules to which repeated reference has been made in this discussion is that which upholds the power of the states to regulate subjects of interstate commerce which do not require a single, uniform national plan of regulation, but permit of diversity of regulation by the several states.[1] It has been shown that this rule occasionally has been applied to the regulation of particular kinds of interstate sale and transportation, although in general the sale and transportation of commodities between the states was said to be a subject requiring uniformity of regulation, and, therefore, beyond the power of the states to regulate.[2] In view of the growing apprehension that the centralization of commercial control will overburden the federal government and its agencies and will deprive local needs and conditions of proper consideration, any indication that the Court is disposed to permit further exceptions to the general principle of exclusive federal jurisdiction over interstate sale and transportation is important. It is, therefore, interesting to note that a comparatively recent decision has recognized the necessity for and validity of local regulation of the rates charged for a form of transportation and sale which it declared to be interstate.[3] This case arose from the distribution

[1] See pp. 85-87, 157, 158, *supra*.

[2] See pp. 89, 90, 155-157, *supra*.

[3] *Pennsylvania Gas Co.* v. *Public Service Commission* (1920), 252 U. S. 23.

of natural gas by a Pennsylvania corporation which transmitted the gas by pipe line from the wells in Pennsylvania into New York, and there furnished it directly to local consumers. The Court held that the State of New York has power to regulate the rates charged for this service. In reaching this conclusion, the Court decided, first, that the business was interstate commerce, second, that the rates not only were not regulated by Congress, but that the Interstate Commerce Act expressly withheld the subject from federal control,[1] and third, that the service, being similar to that of a local plant furnishing gas to consumers in a city, is subject to state regulation. In the Court's opinion Mr. Justice Day said:

> This local service is not of that character which requires general and uniform regulation of rates by congressional action, and which has always been held beyond the power of the states, although Congress has not legislated upon the subject. While the manner in which the business is conducted is part of interstate commerce, its regulation in the distribution of gas to the local consumers is required in the public interest, and has not been attempted under the superior authority of Congress.[2]

The difficulty which the Court has found in drawing the line between subjects which require uniform national regulation and subjects which permit of diversity of state action is shown by a later decision concerning the same industry.[3] In this case the corporation which piped the natural gas from state to state did not sell it to the consumers but to independent distributing companies. The state of Missouri, into which the gas was piped, attempted to regulate the rates charged for such sales. This action was held by the Court

[1] 36 Stat. L. 539, 544.

[2] 252 U. S. at 31.

[3] *Missouri* v. *Kansas Natural Gas Co.* (1924), 265 U. S. 298.

to be a direct burden on interstate commerce and void even in the absence of congressional regulation. The Court admitted that "the line of division between cases where, in the absence of congressional action, the state is authorized to act, and those where state action is precluded by mere force of the commerce clause of the Constitution, is not always clearly marked". It distinguished between the retail distribution of gas to consumers and its wholesale distribution to distributing companies, and said that with respect to the latter form of commerce "the paramount interest is not local but national,—admitting of and requiring uniformity of regulation". These two cases show that the Court, while very reluctant to admit the propriety of state regulation of interstate transactions of sale or transportation, still recognizes that under some circumstances the necessity for local regulation may be so great as to justify departure from the general rule that federal power over this subject is exclusive.[1]

With respect to those forms of interstate commerce which, in the opinion of the Court, admit only of federal regulation, the Court still faces the difficulty of determining whether particular forms of state action are regulations thereof. In a decision denying the power of North Dakota to require licenses for and otherwise regulate the purchase of grain for interstate shipment, Mr. Justice Van Devanter said:

> The decisions of this court respecting the validity of state law challenged under the commerce clause have established many rules covering various situations. Two of these rules are specially invoked here,—one that a state statute enacted for admissible state purposes, and which affects interstate commerce only incidentally and remotely, is not a prohibited state regula-

[1] See also *Public Utilities Commission of Rhode Island* v. *Attleboro Steam and Electric Co.* (1927), 273 U. S. 83, in which the Court held that the State of Rhode Island had no power to regulate the rate charged at the state line for electric power produced by a Rhode Island company and there sold to a Massachusetts distributing company.

tion in the sense of that clause; and the other, that a state statute which, by its necessary operation, directly interferes with or burdens such commerce, is a prohibited regulation and invalid, regardless of the purpose with which it was enacted. These rules, although readily understood and entirely consistent, are occasionally difficult of application, as where a state statute closely approaches the line which separates one rule from the other.[1]

Most of the important recent decisions concerning state legislation affecting interstate transportation are efforts to determine which of the two rules mentioned by Mr. Justice Van Devanter applies, that is, to distinguish between state legislation incidentally and remotely affecting interstate commerce and that which interferes with or burdens such commerce, and is, therefore, unconstitutional as a regulation thereof. Some of the more important recent decisions will now be reviewed. As in the preceding chapters decisions affecting the exercise of the state police power will be discussed first, and those sustaining or limiting the exercise of the state taxing power will be considered thereafter.

The extreme to which the Court will go in sustaining the exercise of the state police power to protect public safety is shown by its attitude with respect to state statutes requiring the elimination of grade crossings. Such legislation usually imposes heavy financial burdens upon the railroads, which in the case of weaker lines engaged in interstate commerce might even result in their bankruptcy. The Court nevertheless held that even the prospect of bankruptcy of an interstate carrier is not sufficient to invalidate state legislation requiring it to expend its funds for the elimination of grade crossings.[2] While it was recognized that the state cannot compel the railroad to serve at a loss, the Court took the

[1] *Shafer* v. *Farmers Grain Co.* (1925), 268 U. S. 189, 199.

[2] *Erie R. R.* v. *Public Utility Commissioners* (1921), 254 U. S. 394.

position that if the railroad continues to use the rights granted to it by the state to occupy the land, it must comply with state safety regulations. Mr. Justice Holmes said:

> If it reasonably can be said that safety requires the change, it is for them [the states] to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. . . . To engage in interstate commerce the railroad must get on to the land; and, to get on to it, must comply with the conditions imposed by the state for the safety of its citizens.[1]

That this case is close to the border line of permissible exercise of state power is shown by the fact that three justices dissented.[2] There seems to be little question that if Congress or its authorized agencies saw fit to intervene to protect an interstate railroad from extreme financial burdens in complying with state grade-crossing statutes, the paramount authority of Congress to regulate interstate commerce would prevail over the state police power.

The decisions of the preceding period made it clear that the Supreme Court will tolerate little direct regulation by the states of the character and quality of service rendered in interstate transportation where the purpose of the regulation is the protection of the general welfare and convenience of the public, and involves no question of health, safety or morals. One of the most noteworthy recent illustrations of this attitude of the Court is found in a decision holding that a state may not require a carrier engaged in interstate transportation by motor vehicle to furnish transportation to all who may apply on equal terms; that is, it cannot compel a carrier engaged in interstate transportation to become a common carrier.[3] The same decision also denied the power

[1] 254 U. S. at 410.

[2] White, Van Devanter and McReynolds.

[3] *Michigan Public Utilities Commission* v. *Duke* (1925), 266 U. S. 570.

of the state to require such a carrier to carry insurance or provide indemnity bonds for the protection of property carried in interstate commerce.[1] In the view of the Court, such requirements constituted a direct burden upon and interference with interstate commerce. The carrier in this case was engaged in the business of transporting automobile bodies between Toledo, Ohio, and Detroit, Michigan, in the performance of private contracts for such transportation. The Court took the position that the state requirement that he become a common carrier would prevent him from using his trucks exclusively in the performance of his contracts and thus would deprive him of the use of the instrumentalities by means of which he carried on the interstate commerce in which he was engaged as a private carrier.[2]

In some situations, however, the Court recognizes that direct state regulation of interstate service cannot be avoided, and sustains such regulation. Congress by the provisions of Section 1(22) of the Interstate Commerce Act, as amended by the Transportation Act of 1920, expressly directs that the authority of the Interstate Commerce Commission to authorize the construction, operation or abandonment of parts of the lines of an interstate carrier "shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one state, or of street, suburban, or interurban electric rail-

[1] The case also decided that a state may not require such a carrier to obtain a permit from a State Commission to engage in interstate transportation over its highways on fixed routes or between fixed termini. See p. 262, *infra*.

[2] The Court held that to require a private carrier to become a common carrier also violates the Fourteenth Amendment prohibiting a state from taking property without due process of law. The Fourteenth Amendment is equally applicable to state regulation of its internal commerce and prevents the state from requiring a private contract carrier engaged solely in intrastate transportation to become a common carrier. *Frost Trucking Co.* v. *Railroad Commission of California* (1926), 271 U. S. 583.

ways, which are not operated as a part or parts of a general steam railroad system of transportation".[1] Recent decisions show that the Court will sustain the power of the states to regulate the construction or abandonment of the facilities thus withheld from the jurisdiction of the Interstate Commerce Commission even when such facilities are used or intended for use principally in interstate transportation.[2] The reason for sustaining the exercise of the state police power thus to regulate interstate transportation is stated by Mr. Justice Brandeis:

> Tracks of that character [spur, industrial, team, switching or side tracks] are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier. The question whether the construction should be allowed or compelled depends largely upon local conditions which the state regulating body is peculiarly fitted to appreciate. Moreover, the expenditure involved is ordinarily small.[3]

The opinion of Congress that the construction and abandonment of such facilities is a subject which permits of diversity of regulation according to local conditions is so clearly indicated by the Transportation Act of 1920 that the Court would naturally hesitate to prohibit the exercise of state power in the absence of clear and convincing proof that uniformity of regulation was essential.

Another decision of this period, *South Covington and Cincinnati Street Railway* v. *Kentucky*,[4] at first glance ap-

[1] 41 Stat. L. 478.

[2] *Western and Atlantic R. R.* v. *Georgia Public Service Commission* (1925), 267 U. S. 493; *Texas and Pacific Ry.* v. *Gulf, C. & S. F. Ry.* (1926), 270 U. S. 266.

[3] 270 U. S. at 278.

[4] (1920), 252 U. S. 399.

pears to sustain state power to regulate interstate transportation service directly by requiring the segregation of interstate white and colored passengers on interurban electric railways. A careful study of the opinion in this case, however, raises considerable doubt whether the Court intended to establish such a rule. The decision sustained a state law of Kentucky requiring railroad companies to supply separate compartments for white and colored passengers under circumstances which will be briefly outlined. The railway company, a Kentucky corporation, controlled a line of road owned by another corporation and lying wholly within Kentucky. It operated interurban electric cars over this controlled line and its own line as a part of one system between Kentucky and Ohio. The state sought to enforce the law with respect to a car so operated on which eighty per cent of the passengers were interstate. Under Ohio law the separation of races was illegal. Nevertheless, the Court held that the enforcement of the Kentucky law was not an unconstitutional burden on interstate commerce. It seems clear that the railway failed to provide separate accommodations for white and colored passengers traveling wholly in the state of Kentucky. That would constitute a violation of the Kentucky statute even if it were construed as applying only to intrastate passengers. There is no specific statement in the decision that the act would be violated by the operation of a car carrying only interstate passengers without segregating them if the railway provided adequate segregated transportation service for its intrastate passengers. In the opinion of the Court Mr. Justice McKenna said:

> There was a distinct operation in Kentucky,—an operation authorized and required by the charters of the companies, and it is that operation the act in the question regulates, and does no more, and therefore is not a regulation of interstate commerce.[1]

[1] 252 U. S. at 403.

It seems fair to interpret this decision as meaning that the distinct operation in Kentucky to which the statute applies is an operation for intrastate Kentucky passengers over the line owned by the subsidiary corporation located in that state. While the Court unfortunately did not make it clear that the decision was not intended to sustain state power to segregate interstate passengers, it is not sufficiently explicit to be relied on as an authority for sustaining such power.

No decisions of this period disturb the general rule that the states have complete power to regulate the intrastate transportation charges of interstate carriers provided that the regulation does not conflict with federal laws or orders and is not confiscatory. The decisions affecting state power to regulate intrastate rates deal with the situation arising when Congress through the Interstate Commerce Commission has intervened to protect interstate commerce from discrimination.[1]

Attacks continued to be made upon state regulation of the character and quality of the service rendered in intrastate transportation because of its effect upon interstate commerce. A few of these decisions will be considered. The *South Covington Railway* case, previously outlined,[2] clearly sustained the power of a state to require the segregation of intrastate white and colored passengers under circumstances which apparently make the enforcement of the statute a distinct burden upon interstate transportation. In that case the comparative volume of intrastate traffic was so small that the railway would be compelled either to transfer its interstate passengers to cars with separate compartments on entering Kentucky or to incur the heavy financial burden of operating additional intrastate cars for a very light volume of traffic. In the view of three dissenting justices,[3] an un-

[1] See pp. 234-238, *supra*, pp. 303-309, *infra*.

[2] See pp. 252, 253, *supra*.

[3] Day, Van Devanter and Pitney.

reasonable burden was imposed on the railway by requiring it thus to change the character of its cars on crossing the state line.

The Court sustained the exercise of the police power of the state to require interstate railroads to provide adequate and suitable facilities for the convenience of the community served by them when the state requirements did not involve the construction of additional main line or capital expenditures necessitating the issuance of new securities, over which subjects Congress has assumed exclusive jurisdiction.[1] In denying the power of a state to require the construction of a union terminal involving a relocation of the main lines of interstate carriers and large capital expenditures, Chief Justice Taft said:

> One might, too, readily conceive of railroad crossings or connections of interstate carriers in which the exercise by a state commission of the power to direct the construction of merely local union stations or terminals without extensions of main tracks and substantial outlay should be regarded as an ordinary exercise of the police power of the state for the public convenience, and would not trench upon the power and supervision of the Interstate Commerce Commission in securing proper regulation of an interchange of interstate traffic or passengers. Only a lawful order of the Interstate Commerce Commission would raise a question of the power of a state commission in such cases.[2]

A short time thereafter, the Court held that a state commission may require a railroad to provide suitable facilities reasonably necessary for the removal from its premises of freight carried by it for its customers.[3] In this case the

[1] *Railroad Commission* v. *Southern Pacific Co.* (1924), 264 U. S. 331, 345; *Norfolk and Western Ry.* v. *Public Service Commission of West Virginia* (1924), 265 U. S. 70.

[2] 264 U. S. at 345.

[3] *Norfolk and Western Ry.* v. *Public Service Commission of West*

facilities consisted of a roadway along a siding and a crossing along the main line of a railway leading thereto.

On the other hand, we find two decisions in which the Court continued to restrict the power of the states to stop interstate trains to accommodate intrastate traffic.[1] One of these cases set aside an order of a state commission which required a railroad to detour two interstate passenger trains over a branch to serve a small city already receiving adequate service by fourteen local trains.[2] The other case held that a state order was invalid which required two long-distance interstate trains passing through a city at night to stop. This was held to be an undue interference with interstate commerce because the city had adequate service from four other through interstate trains.[3]

The states may still regulate intrastate transportation service by controlling the construction and abandonment of the whole or any part of a road within their borders over which Congress has not conferred similar power upon the Interstate Commerce Commission. The roads or tracks to which such state power still applies, include railroads which are not engaged in or have withdrawn from interstate transportation,[4] spur, industrial, team, switching or side tracks of interstate steam railroads, and all parts of independently

Virginia, supra. See also *Shealy* v. *Southern Ry.* (1924), 127 S. C. 15, 120 S. E. Rep. 561, in which the Supreme Court of South Carolina sustained the power of its state commission to require an interstate railroad to construct sheds for the protection of passengers at a junction point. Considerable weight was given in the various opinions in this case to the facts that most of the passengers at this point were intrastate, and that the sheds were necessary for the protection of the public health.

[1] *St. Louis and San Francisco Ry.* v. *Public Service Commission of Missouri* (1921), 254 U. S. 535; *St. Louis-San Francisco Ry.* v. *Public Service Commission of Missouri* (1923), 261 U. S. 369.

[2] 254 U. S. 535.

[3] 261 U. S. 369.

[4] *Texas* v. *Eastern Texas R. R.* (1922), 258 U. S. 204.

operated electric railways.[1] It must not, however, be supposed that the power of the states to compel the continued operation of such railways is unlimited. The Court has held that a state may not compel a railway company to continue to operate at a loss unless it is under a contract obligation to maintain service.[2] State action prohibiting the abandonment of all operations under such circumstances is considered to violate the constitutional provisions prohibiting the taking of property without due process of law. A different situation prevails, however, where the proposed abandonment relates only to a part of a railway which proposes to continue operation of the rest of its system. It was held that a street railway company may be compelled by a state to operate an unprofitable line, even though its entire operations may not yield a fair return, if it continues to exercise its franchises on other parts of its system.[3] In this case Mr. Justice Brandeis said:

> So far as it appears, this company is at liberty to surrender its franchises and its continued operation throughout the city. . . . But the Constitution does not confer upon the company the right to continue to enjoy the franchise or indeterminate permit, and escape from the burdens incident to its use.

The principle of this decision, of course, has no application to the operation or abandonment of any part of an interstate steam railroad system which the Interstate Commerce Commission may authorize or prohibit under the provisions of the Transportation Act of 1920.[4]

It is entirely clear that the Court would not tolerate state

[1] Interstate Commerce Act, Sect. 1 (22).

[2] *Bullock* v. *Florida* (1921), 254 U. S. 513; *Railroad Commission of Texas* v. *Eastern Texas R. R.* (1924), 264 U. S. 79.

[3] *Fort Smith Light and Traction Co.* v. *Bourland* (1925), 267 U. S. 330.

[4] See *Colorado* v. *United States* (1926), 271 U. S. 153. See pp. 239-243, *supra*.

legislation regulating the character and quality of intrastate transportation service which required the railroads to give preference to traffic moving wholly within the state in the use of their transportation facilities. A recent decision held that a West Virginia statute was unconstitutional which required pipe-line companies to give preference to West Virginia consumers of natural gas over consumers outside of the state in distributing gas produced within the state.[1] This statute was regarded by the Court as a burden upon and obstruction of interstate commerce. The argument advanced by the state was that the supply of gas produced in West Virginia was insufficient to meet both local and interstate demands. The Court, however, held that the transmission of this gas from one state to another for sale and consumption in the outside state is interstate commerce, and that the state law by its necessary operation would prevent and obstruct such transmission, and would jeopardize the health, comfort and welfare of the communities using the gas in other states. The principle of this decision would be equally applicable to state legislation requiring interstate railroads to give preference to the movement of their traffic wholly within the state even if there were no federal law or order prohibiting such preference.

The attacks upon state legislation affecting interstate commerce are not confined to cases in which the states attempt to regulate the charges of or the services rendered by the railroads, but extend to the exercise of state power along lines not directly connected with transportation. It is generally conceded that the sovereignty of the states embraces the power to prescribe the procedure in state courts. Legislation for this purpose is, however, held by the Court to impose an unconstitutional burden upon interstate commerce under some circumstances. A Minnesota statute provided

[1] *Pennsylvania* v. *West Virginia* (1923), 262 U. S. 553.

that suit in the state courts could be commenced against any foreign corporation having an agent in the state for the solicitation of freight and passenger business by delivering a copy of the summons to such an agent. In *Davis* v. *Farmers' Cooperative Equity Company*,[1] the Court held that this statute violated the commerce clause by imposing an unreasonable burden on interstate commerce as applied to an action against a railroad company not operating in Minnesota, brought by a plaintiff not residing there on a cause of action arising outside of the state. The burden was found in the great expense which would be imposed upon a defendant railroad in conducting a litigation in a jurisdiction remote from where the cause of action arose. The basis of the decision, as pointed out by Mr. Justice Brandeis, was the direct concern of the public in the avoidance of waste in interstate service as well as in the maintenance of such service.[2] Another customary method of commencing action against a foreign corporation in a state court is by the garnishment or attachment of property or accounts of the defendant corporation in the state in which jurisdiction is sought. Following the principle of *Davis* v. *Farmers' Cooperative Equity Company*, it was decided that a state could not constitutionally authorize its courts to obtain jurisdiction by garnishment of the rolling stock of a foreign railroad corporation engaged in interstate commerce which neither owned nor operated a railway in the state, nor had consented to be sued in its courts, in a cause of action by a non-

[1] (1923), 262 U. S. 312.

[2] But where the defendant railroad is incorporated by the state in which the action is brought, that state may authorize its courts to entertain jurisdiction thereof notwithstanding the non-residence of the plaintiff, the fact that the cause of action arose in another state, and the expense and interference with interstate commerce caused by bringing material witnesses engaged in railroad service to the place of trial. *Hofmann* v. *Missouri, ex rel. Foraker* (1927), 274 U. S. 21.

resident arising outside of the state.[1] Such procedure was regarded as an unreasonable interference with interstate commerce. On the other hand, the Court sustained the jurisdiction of a Missouri court acquired by garnishment under somewhat different circumstances.[2] In this latter case the suit was also brought against a foreign railroad corporation engaged in interstate commerce which operated no railroad, had no local place of business, and had not consented to be sued in the state; the subject of garnishment was its traffic balance due from connecting railroads having places of business in Missouri. The distinguishing features upon which the Court relied to support the jurisdiction of the Missouri Court were the facts that the plaintiff, a Delaware corporation, had a usual place of business in Missouri which gave it the status of a resident of that state for legal purposes, and that it was possible that the cause of action, damage in transit to freight shipped from Texas to Missouri, might have arisen in Missouri. Under the provisions of the Carmack amendment to the Interstate Commerce Act,[3] the defendant railroad, although operating only in Texas, was liable for loss or damage to shipments originating on its lines, even when actually occurring on the lines of its connections.[4] It is thus apparent that a state violates the commerce clause of the Constitution by throwing its courts open to suits of non-residents on causes arising outside of the

[1] *Atchison, T. & S. F. Ry.* v. *Wells* (1924), 265 U. S. 101.

[2] *St. Louis, B. & M. Ry.* v. *Taylor* (1924), 266 U. S. 200.

[3] 34 Stat. L. 584, 595.

[4] Another interesting point decided in this case is that Congress, by the Carmack Amendment, has not assumed exclusive jurisdiction of the remedy and procedure to be followed in enforcing the substantive rights conferred by that legislation, and that the states have concurrent jurisdiction to prescribe matters of procedure in recovering for loss or damage to interstate shipments so long as they do not enlarge or abridge the substantive right conferred by federal law. See pp. 314, 315, *infra*.

state and brought against an interstate railroad not doing business in the state or consenting to be sued therein, but that the power of the state to promote the general welfare and convenience of its residents extends to providing remedies in the state courts to residents on suits arising in the state against a foreign railroad corporation which has any property, tangible or intangible, located therein.

While the states may thus regulate or affect the conduct of the business of interstate transportation within their borders in a variety of ways, and enforce their regulations by appropriate penalties, the Court continues to enforce the rule that compliance with state regulations cannot be made a condition precedent to the exercise of the right to engage in interstate commerce, and that such right cannot be made to depend upon the authorization or permission of the states. In accordance with this principle, it was decided that a Kentucky statute, prescribing the conditions upon which corporations of other states might do business in Kentucky, was not applicable to a Tennessee corporation whose only business in Kentucky was the purchase of grain for interstate shipment.[1] The rule was stated by Mr. Justice Van Devanter in this case as follows:

> A corporation of one state may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such [interstate] commerce; and any statute of the latter state which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause.[2]

This case was followed in a later decision in which it was held that a state license law imposing a license fee on coal dealers could not constitutionally be applied to invalidate a contract for the sale of coal f. o. b. cars at mine for interstate ship-

[1] *Dahnke-Walker Milling Co.* v. *Bondurant* (1921), 257 U. S. 282.

[2] *Ibid.* at 291.

ment by dealers who had not paid the fee.[1] Irrespective of the right of the state in this case to require the payment of a license fee, the Court held that such payment could not be made a condition precedent to the exercise of the right to engage in interstate commerce.[2] The same rule was applied in holding the states have no power to require persons engaged in the purchase of grain for interstate shipment to obtain a state license for the conduct of this business.[3]

From the standpoint of the present discussion, by far the most important decisions following this principle are those which hold that the states have no power to require persons engaged in the business of interstate transportation by motor vehicle over the state highways to obtain the permission of the states for such use of the highways.[4] In *Buck* v. *Kuykendall*[5] and *Bush Company* v. *Maloy*,[5] the Court held that state statutes prohibiting common carriers for hire from using state highways for the operation of motor vehicles between fixed termini or over regular routes without a certificate of convenience and necessity from a state commission, are primarily not regulations to secure safety on the highways or to conserve them, but are prohibitions of competition and, as applied to common carriers engaged in inter-

[1] *Flanagan* v. *Federal Coal Co.* (1925), 267 U. S. 222.

[2] See also *Underwood Typewriter Co.* v. *Chamberlain* (1920), 254 U. S. 113, 119; *Southern Ry.* v. *Watts* (1923), 260 U. S. 519, 530; *Pullman Co.* v. *Richardson* (1923), 261 U. S. 330, 340, and cases there cited, to the effect that the provisions of a state statute excluding a company not paying a state tax from doing business in the state would be invalid as applied to interstate commerce.

[3] *Lemke* v. *Farmers Grain Co.* (1922), 258 U. S. 50; *Shafer* v. *Farmers Grain Co.* (1925), 268 U. S. 189.

[4] *Michigan Public Utilities Commission* v. *Duke* (1925), 266 U. S. 570; *Buck* v. *Kuykendall* (1925), 267 U. S. 307; *Bush Co.* v. *Maloy* (1925), 267 U. S. 317.

[5] *Supra.*

state commerce, are in violation of the commerce clause of the United States Constitution. These decisions, however, must not be interpreted as denying all state power to regulate or affect the conduct of interstate transportation by motor vehicle. They contain no implication that the exercise of state power within its commonly recognized spheres is not applicable to this business. State regulations designed to promote the health and safety of the inhabitants of the state, or to make such carriers pay their share of the cost of maintenance of the highways used by them, or to require them to render adequate intrastate transportation service at reasonable rates, if they also undertake to engage in the business of intrastate transportation, are undoubtedly valid unless in conflict with federal legislation adopted in the regulation of interstate commerce, or in violation of the constitutional prohibitions against the taking of liberty or property without due process of law. The Court also sustained state power to require an interstate carrier by motor vehicle to obtain a state license to carry intrastate passengers on their interstate busses, in the absence of proof that its interstate passengers may not be carried efficiently and economically in busses used exclusively for that purpose.[1] Other recent decisions sustaining state legislation as applied to interstate carriers by motor vehicle have held that a state has power to limit the loads of motor vehicles to protect the highways from injury unduly increasing the cost of maintenance,[2] that carriers engaged in business on the highways may be compelled to pay a tax for their cost and upkeep in addition to the license fee imposed upon all automobile owners,[3] and that a state statute is valid which provides that a nonresident, by using the highways, thereby appoints the state

[1] *Interstate Busses Corp.* v. *Holyoke St. Ry.* (1927) 273 U. S. 45.

[2] *Morris* v. *Duby* (1927), 274 U. S. 135.

[3] *Clark* v. *Poor*, U. S. Sup. Ct., May 31, 1927.

registrar as his attorney to receive service of process in causes of action arising therefrom.[1]

A recent decision, consistent with the principle that the right to engage in interstate commerce cannot be made to depend upon state authorization, is of particular interest because of the vigorous dissent of Justices Brandeis, Holmes and Stone.[2] This case involved a Pennsylvania statute which required persons or corporations other than railroad or steamship companies, selling steamship tickets or orders for transportation to or from foreign countries, to procure a license, furnish proof of character and fitness to conduct such business, and give bonds to account for moneys received and to abstain from fraud and misrepresentation. The statute imposed an annual license fee of fifty dollars which did not appear to exceed the cost to the state of supervising the administration of the law. The purpose of the statute was to protect residents of the state against fraud in the conduct of this business. The Court reversed a conviction for violation of this statute by conducting the business of selling such steamship transportation without a license. The majority took the position that the business was a well-recognized part of foreign commerce and that the license fee and other requirements imposed by the statute constituted a direct, and therefore unconstitutional, burden on such commerce. The dissenting Justices laid stress upon the necessity of considering all the facts and circumstances surrounding a state statute with a view to determining whether the statute does in fact obstruct, discriminate against, or directly burden interstate or foreign commerce. They regard the rule of law to be settled that the states in the exercise of their police power must avoid such obstruction, discrimination or burden. They insist, however, that the actual decision must

[1] *Hess* v. *Pawloski* (1927), 274 U. S. 352.

[2] *Di Santo* v. *Pennsylvania* (1927), 273 U. S. 34.

depend upon the effect of the particular statute upon interstate or foreign commerce, which is a question of fact. The Pennsylvania statute, according to this minority, did not in fact impose an obstruction, discrimination or burden upon foreign commerce, and was merely a proper exercise of the police power of the state to protect its citizens from fraud. The view of the minority, carried to its logical conclusion, would break down the distinction made between state regulation of the conditions precedent to engaging in interstate business which is prohibited, and state regulation of the conduct of that business which is permitted under many circumstances. It would apply to both kinds of regulation the same tests based on a study of the facts and a balancing of local needs against the magnitude of the impediment to interstate commerce.[1]

These various decisions produce an anomalous situation with respect to state power to require licenses for transactions of interstate commerce. The states are not permitted to prohibit a person from engaging in a business which is recognized as a part of interstate commerce without obtaining a license, but they are permitted to require a license for the performance of certain acts which are absolutely essential to the successful conduct of such business. It is scarcely possible to conduct interstate transportation by railroad without the employment of locomotive engineers, yet the state police power may be exercised in the interest of public safety to compel every such engineer to obtain a license.[2] The states cannot require a person to obtain a certificate of convenience and necessity to engage in interstate transportation by motor vehicle, but such a person finds it impossible to conduct that business without obtaining state licenses for each of his motor vehicles to use the public highways. It is

[1] See pp. 78, 115, 172, 177, 179, 180, *supra*.

[2] *Smith* v. *Alabama* (1888), 124 U. S. 465.

very difficult to see why state licensing of the business itself should be prohibited regardless of the surrounding facts and circumstances, while state licensing of acts essential to the conduct of the business is permitted when the Court finds that the protection of the public reasonably requires that degree of interference with interstate commerce. In either case the unreasonable exercise of state power, if permitted, could bring interstate commerce to a standstill. In either case the Supreme Court could prevent such a calamity by the exercise of a proper discretion in determining, as a question of fact, whether the state license requirements, under all the circumstances, exceed the reasonable demands of their residents for protection by local laws.

Some recent decisions deserve attention which concern state power to impose charges upon interstate commerce, not as taxes, but merely as fees to compensate the state for specific expenditures made in the exercise of its police powers. It has been shown previously that a reasonable charge for the services of the state in policing transactions of interstate commerce, or for the use of facilities furnished by the state, is generally regarded as merely part of the necessary expense of engaging in interstate business and not as a tax or burden thereon. This applies to fees imposed for state inspection of commodities moving between the states, where the inspection is a legitimate exercise of the power of the state to protect the public safety and health as in the case of inflammable petroleum products. But the Court has continued to hold that state laws applicable to both interstate and intrastate commerce, which impose fees for the inspection of petroleum products in excess of the legitimate cost of inspection, amount to taxation and are void to the extent that the excess is collected from interstate transactions.[1] Assessments imposed to compensate the state

[1] *Texas Co.* v. *Brown* (1922), 258 U. S. 466; *Phipps* v. *Cleveland Refining Co.* (1923), 261 U. S. 449.

for public improvements beneficial to interstate commerce are closely analogous to fees for services or for the use of facilities. Assessments being necessarily limited to the expense actually incurred by the state, no tax or burden is imposed upon interstate commerce by compelling those engaged therein to pay for the benefits accruing to their interstate business, if the levy is fairly apportioned and does not exceed the actual benefit derived from the improvement. In a recent case an interstate railroad was assessed for the improvement of a highway; the assessment, principally based upon benefits to accrue to the railroad in the form of increased interstate traffic, was sustained.[1] This case originated in a state court where the railway included among its objections to the assessment the argument that it was made in disregard of the commerce clause of the United States Constitution because the benefits assessed were such as would accrue to the interstate business in which its property was being used and not to the property itself, and therefore could not be made the basis of a special improvement tax without burdening interstate commerce. This particular ground of attack was abandoned by the railway in its appeal to the United States Supreme Court.

Where state-granted privileges are exercised in the construction of an instrumentality of interstate commerce, the states may to a certain extent attach conditions to the grant of those privileges which in fact amount to regulations of interstate commerce. Thus a state charter of a corporation constructing an international bridge was amended to provide that the company should equip the bridge with ways for foot passengers and vehicles. The bridge was built as a railroad bridge only and the Court held that the state could compel the company to provide the additional facilities in accordance with the provisions of its charter.[2] In this case the

[1] *Kansas City Southern Ry.* v. *Road District* (1924), 266 U. S. 379.

[2] *International Bridge Co.* v. *New York* (1920), 254 U. S. 126.

commerce affected by the enforcement of state charter provisions was foreign, but the same principles apply to interstate commerce. The theory that a state's power to grant or withhold privileges embraces the lesser power to attach any conditions it desires to its grant was pretty thoroughly shattered by the decision in *Western Union Telegraph Company* v. *Kansas,* which held that the conditions attached to the privilege of engaging in intrastate business must not in fact impose a burden on interstate commerce.[1] It is, therefore, unsafe to attempt to deduce any general rule from cases supporting the conditions attached to state grants of charter or other privileges, as state power to regulate or affect interstate commerce in this way is distinctly limited. It is, moreover, strictly subordinate to the exercise of federal power by Congress so that the state-imposed conditions are not enforcible if in conflict with federal law.[2]

Let us now consider decisions affecting the taxing power of the states. Two cases decided since 1920 are of interest because they show further extensions of the application of the rule that the states must not impose a tax burden upon the operations of the United States Government or its agencies in the execution of federal law.[3] In one of these cases the Court held that the net income derived by a lessee of Indian lands from sales of his share of oil and gas taken from such lands could not be taxed by a state because the lessee was an agent of the United States Government in the discharge of its duties to its Indian wards.[4] The Court had previously decided that a general state property tax levied upon the property of agencies of the United States Govern-

[1] (1910), 216 U. S. 1. See p. 181, *supra.*

[2] See *International Bridge Co.* v. *New York, supra.*

[3] *Gillespie* v. *Oklahoma* (1922), 257 U. S. 501; *Jaybird Mining Co.* v. *Weir* (1926), 271 U. S. 609.

[4] *Gillespie* v. *Oklahoma, supra.*

ment and used by them in carrying federal laws into execution was not unconstitutional.[1] The theory that such a tax, if non-discriminatory, does not obstruct the operation of federal law, would appear to apply equally to a non-discriminatory tax upon net income. A net income tax is not considered to be a burden upon interstate commerce when levied upon income derived from such commerce.[2] It is not at all clear that there is any more cogent reason for holding that such a tax is an unconstitutional burden upon the operations of federal agencies. Mr. Justice Holmes, however, distinguished between interstate commerce and an instrumentality of the United States as affected by such a tax in deciding that the tax on income derived from Indian lands was unconstitutional. He said:

> The criterion of interference by the states with interstate commerce is one of degree. It is well understood that a certain amount of reaction upon and interference with such commerce can not be avoided if the states are to exist and make laws. . . . The rule as to instrumentalities of the United States on the other hand is absolute in form and at least stricter in substance. . . . "A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them." 240 U. S. 530. The step from this to the invalidity of the tax upon income from the leases is not long.[3]

If a general policy of federal incorporation of interstate railroads should be adopted, so that the present state corporations would be replaced by federal corporations, and if the net income of the federal corporations should be held exempt from state taxation, a grave crisis in state finance would result from the loss of this fruitful source of revenue.

The other decision casts some doubt upon the rule that

[1] See pp. 101-103, *supra*.

[2] See pp. 204, 205, *supra*.

[3] 257 U. S. at 505.

the property of federal agencies is subject to a general state property tax levied without discrimination against such agencies.[1] In this case the state of Oklahoma sought to levy an *ad valorem* property tax on the ores taken from Indian lands by a lessee. The tax was assessed on these ores in mass in the lessee's bins prior to the payment or segregation of the royalties or equitable interests of the Indians. The Court considered that the lessee was an agent employed by the government for the development and use of the restricted land and to mine the ore therefrom for the benefit of the government's Indian wards. It, therefore, held that this property tax was unconstitutional. In the decision, the Court made no reference to the previous distinction between a tax on the property of an agent of the government and a tax on the occupation of such agent in carrying into execution the laws of the United States. The decision, however, doubtless turned on the fact that the Indian wards of the United States still had an interest in the property that was assessed and cannot be regarded as completely overruling the prior decisions to the effect that the property of agencies of the United States Government used in the execution of its laws is not exempt from a general state property tax. But the taxable status of such property at the present time would be more clear if the Court in the course of its opinion had explicitly stated that the state had power to tax property of the lessee in which the Indians had no equitable interest.

Several decisions of this period deserve attention which concern the application of the rule that the states have no power to burden interstate commerce by taxation. The Court continued to follow its previous decisions that this rule is not violated by an *ad valorem* property tax assessed upon railroad property within the state under the so-called

[1] *Jaybird Mining Co.* v. *Weir, supra.*

unit method of including in one assessment all elements of property value, both tangible and intangible,[1] and that such an assessment may include the value arising from the franchise to engage in the business of interstate transportation.[2] It seems, however, that a state property tax, which assessed the franchise to do interstate business and disregarded other elements of intangible value, would be considered an unconstitutional burden on interstate commerce; the validity of a property tax on such a franchise, therefore, depends upon its being a general tax which includes all elements of value, and which is, therefore, not aimed directly at the business of interstate transportation.[3] The Court also stated that a state property tax may be measured by the net profits of a corporation earned within the taxing state, although these profits may have been derived in part or indeed mostly from interstate commerce.[4]

We have already seen that the rule that a state may not levy a tax upon property beyond its borders gives rise to the problem of apportioning the property values of an interstate railroad between the taxing state and the other states in which the railroad operates. The Court continued to give attention to this problem.[5] In one case the State Tax Commission of North Dakota computed the value of all the property of an interstate railroad, wherever located, by the market value of its stocks and bonds, and then assessed the proportion of this value that the main track mileage within the state bore to the main track mileage of the whole line.[6]

[1] *St. Louis & E. St. L. Elec. Ry.* v. *Missouri* (1921), 256 U. S. 314; *Southern Ry.* v. *Watts* (1923), 260 U. S. 519.

[2] *St. Louis & E. St. L. Elec. Ry.* v. *Missouri, supra.*

[3] See *St. Louis & E. St. L. Ry.* v. *Missouri, supra.*

[4] *Underwood Typewriter Co.* v. *Chamberlain* (1920), 254 U. S. 113, 120.

[5] *Wallace* v. *Hines* (1920), 253 U. S. 66; *Schwab* v. *Richardson* (1923), 263 U. S. 88.

[6] *Wallace* v. *Hines, supra.* The tax involved in this case was an excise

Upon the particular facts of this case, it was decided that the mileage proportion method of apportionment was improper. These facts were that the cost of constructing the mileage on the plains of North Dakota was comparatively low and that the railroad owned valuable terminal property and land grants in other states, and bonds secured by mortgages on lands in other states, no part of the value of which was properly attributable to North Dakota. Mr. Justice Holmes stated the principle as follows:

> The only reason for allowing a state to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart,—not, in other words, to open to taxation what is not within the state. Therefore no property of such an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the state.[1]

There is nothing in this opinion to discredit the mileage-proportion basis for assessing value within the state where there are no circumstances making its use inequitable. The Court expressly said that on the allegations of the appeal in this case " which is all that we have before us, the circumstances are such as to make that mode of assessment indefensible ". In a recent decision the Court refused to sustain a Kentucky assessment which was made by the mileage-proportion basis upon the intangible property value of sub-

tax upon the privilege of doing business in North Dakota, measured by the railroad's property in that state, but the decision concerning the method of apportioning property value to the taxing state is equally applicable to a state property tax and the Court so stated in the opinion.

[1] 253 U. S. at 69.

sidiary lines of the Southern Railway system operated in Kentucky.[1] This decision also was based upon particular circumstances making the use of this basis of assessment inequitable. The Kentucky lines to which the assessment was attributable showed a very much lower income per mile than the average for the entire Southern Railway system. While recognizing that as feeders their contribution to the value of the system as a whole might exceed that computed by capitalizing their net earnings, the Court was unable to find any foundation for attributing to these lines a sufficient amount of the system earnings to justify an assessment of their intangible value upon the mileage-proportion basis. In another case the Court sustained an apportionment of intangible property value based upon the ratio of the business transacted in the taxing state to the total business of the railroad.[2] This method is less likely to give undue weight to large property values outside of the taxing state than the mileage-proportion method, because the volume of business tends to be proportionately less in those states in which the property is less highly developed. The business-proportion method of apportioning property value would cause the assessment to increase to some extent with an increase in the gross receipts derived in the taxing state from interstate commerce, if receipts in other states did not increase to the same degree. This contingency, however, is scarcely sufficient to characterize this method of assessment as imposing a burden on interstate commerce. Furthermore a gross receipts tax in lieu of a property tax is not forbidden;[3] there is no stronger reason for prohibiting a property tax measured by gross receipts.

We have already seen that certain forms of taxation, such

[1] *Southern Ry.* v. *Kentucky* (1927), 274 U. S. 76.

[2] *Schwab* v. *Richardson* (1923), 263 U. S. 88.

[3] See pp. 194, 195, *supra*.

as that imposed on gross receipts, which would ordinarily be held to constitute unconstitutional burdens on interstate commerce, are sustained if the tax is levied in lieu of a general property tax.[1] In accordance with this principle, the Court sustained an *ad valorem* state property tax of twenty-five mills levied by Louisiana on the rolling stock of non-resident corporations having no domicile in the state because it was in lieu of local taxes levied by the various parishes on corporations domiciled in the parish.[2] Ordinarily a state property tax to be valid, as applied to property used in interstate transportation, must not discriminate against non-residents, but in this case the element of discrimination was removed by the fact that the local parish taxes, to which resident corporations were subject, averaged throughout the state about the same amount as the state tax on non-resident corporations which was sustained.

We have seen in the previous chapter that the Court sustained the power of the states to impose an income tax upon the net income of corporations created by them even when it is derived from transactions of interstate commerce.[3] In *Shaffer* v. *Carter*, decided in 1920,[4] it was held that the power to tax net income may also be exercised to tax the income of a non-resident derived within the taxing state from transactions of interstate commerce. This decision is a logical application to income taxation of the same theory which sustained property taxes upon property of non-residents located in the taxing state and used in interstate

[1] See pp. 194, 195, *supra;* see also *Pullman Co.* v. *Richardson* (1923), 261 U. S. 330, sustaining a California tax levied in lieu of all property taxes and measured by a percent of the gross earnings within the state, including those derived from interstate transportation.

[2] *General American Tank Car Corp.* v. *Day* (1926), 270 U. S. 367.

[3] See pp. 204, 205, *supra.*

[4] 252 U. S. 37, 57.

commerce. If a non-discriminatory property tax is not considered to be an unconstitutional burden upon interstate commerce, since it merely imposes upon those engaged in such commerce their fair share of the ordinary expenses of the government of the states in which they operate, there appears to be no good reason why such expense cannot be as fairly apportioned by an income tax levied upon all income earned within the state, including that derived from interstate commerce. While income taxes are usually assessed upon the net income of a person or corporation computed by deducting from gross income various expenses, such as interest paid by the taxpayer on his obligations, it has been held that an income tax need not be a tax *in personam* upon the *owner* of property measured by his net income from all sources, but may be a tax *in rem* upon the property, in which case the interest paid by the owner on his obligations is not deductible.[1] In so holding the Court sustained a North Carolina tax upon the net income derived from the operation of a railroad within the state, in computing which the non-railway income of the corporation was not included, and no deduction was made of interest paid on its obligations. The Court decided that such a tax was valid and did not violate the commerce clause of the Constitution notwithstanding the fact that much of the income taxed was derived from interstate commerce.

Previous decisions had firmly established the rule that the states may not impose a direct excise or occupation tax upon engaging in the business of interstate commerce.[2] Under this rule it was held that a state cannot impose a license tax upon a steamship agency whose duty is to solicit business, issue bills of lading, collect freight and generally look after loading and unloading vessels entirely engaged in interstate

[1] *Atlantic Coast Line R. R.* v. *Daughton* (1923), 262 U. S. 413.

[2] See pp. 104-111, 195-197, *supra*.

and foreign commerce.[1] This case deserves comment because of the dissent of Justices Brandeis and Holmes, who contended that such a tax is no more of a direct burden on interstate commerce than are concededly valid taxes on other indispensable instrumentalities thereof, such as the ship or the pilot boat which she must employ. The decision of the majority may be considered authority for the proposition that the rule against state taxation of the occupation or business of interstate transportation applies also to occupations incidental or auxiliary to such transportation. Two decisions of this period are of interest because of the conflict between members of the Court as to whether this rule prohibits a state tax upon the exercise by foreign corporations of the privilege of carrying on the business of interstate commerce in corporate form.[2] The cases held that such a tax is an unconstitutional burden upon interstate commerce, but Mr. Justice Brandeis, in a minority opinion, took the position that a tax upon the exercise of the privilege of doing business as a corporation is not a tax upon the occupation in which the corporation is engaged. He said:

> Under the rule applied, every tax laid by any state upon the corporate franchise (properly so called) of every corporation, domestic or foreign, must be void, in the absence of congressional authorization, where the corporation is actually engaged exclusively in what is deemed interstate commerce. I find in

[1] *Texas Transport and Terminal Co.* v. *New Orleans* (1924), 264 U. S. 150. This case was said by the majority in *Di Santo* v. *Pennsylvania* (1927), 273 U. S. 34 (see p. 264, *supra*), to control the latter decision. The two cases, however, seem distinguishable, because the *Texas Transport* case concerns the exercise of the state taxing power, while the license fee in the *Di Santo* case was imposed, not as a revenue measure, but merely to defray the expenses to be incurred in the supervision of the licensees.

[2] *Ozark Pipe Line* v. *Monier* (1925), 266 U. S. 555; *Alpha Portland Cement Co.* v. *Massachusetts* (1925), 268 U. S. 203.

the Constitution no warrant for the assumption which leads to such a result.

The tax assailed is not laid upon the occupation. . . . Nor is the tax laid upon the privilege of doing business. It is laid upon the privilege of carrying on business in corporate form; of doing so with a usual place of business within the state; and with power to exercise for that purpose the right of eminent domain. . . .

Can it be said that this tax directly burdens interstate commerce? A tax is a direct burden, if laid upon the operation or act of interstate commerce. Thus, a tax is a direct burden where it is upon property moving in interstate commerce [cases cited], or where, like a gross-receipts tax, it lays a burden upon every transaction in such commerce [cases cited]. But a tax is not a direct burden merely because it is laid upon an indispensable instrumentality of such commerce, or because it arises exclusively from transactions in interstate commerce. Thus, a tax is valid although imposed upon property used exclusively in interstate commerce [cases cited]; or although laid upon net income derived exclusively from interstate commerce [cases cited]. These taxes were held valid because, unlike a gross-receipts tax, they do not withhold "for the use of the state, a part of every dollar received in such transactions". . . . Surely the tax upon the corporate franchise is as indirect as the tax upon the pipe line.[1]

The majority, however, took the opposite view, so that these cases clearly affirm the rule that a state tax upon a foreign corporation's exercise of the privilege of doing the business of interstate commerce in a corporate capacity is a tax upon that occupation and, therefore, an unconstitutional burden upon such commerce.

Brief reference will now be made to a few decisions concerning state excise taxes upon the exercise by domestic corporations of the franchise to do business as a corporation

[1] *Ozark Pipe Line* v. *Monier* (1925), 266 U. S. 555, 567, 569.

granted by the taxing state. The immediate subject of taxation in such cases, being a privilege granted by the state imposing the tax, is in general within the recognized taxing power of the state. In assessing such a tax against corporations engaged in interstate transportation, it is very difficult to avoid using a measure which will not impose some burden upon interstate commerce. The Court, however, has continued to be very liberal in sustaining this particular form of state taxation, notwithstanding the fact that the measures used reflect to some degree the interstate activities of the corporations. Except for the use of gross receipts derived from interstate commerce as a measure of such an excise tax, the Court has given its approval to the methods of assessment commonly adopted by the states. Recent decisions have sustained the measurement of this tax by the amount of the corporation's capital and surplus employed in the taxing state for all purposes including interstate commerce,[1] and by the value of that portion of the corporation's intangible property which is equitably apportionable to the taxing state.[2] The Court also made it very clear that the rule that a state may not measure an excise tax by the total authorized capital of a foreign corporation engaged in interstate commerce does not apply to a similar tax upon the corporate franchise of a domestic corporation, since the privilege to issue the stock is granted by the state and is, therefore, taxable by the state.[3] It is obvious that all of these measures, the amount of stock employed within the state, the value of the intangible property of the corporation in the state, or the total authorized capital, are likely to vary more or less directly with the interstate business of the corporation as well as with its intrastate activities. To the

[1] *St. Louis–San Francisco Ry.* v. *Middlekamp* (1921), 256 U. S. 226.

[2] *Schwab* v. *Richardson* (1923), 263 U. S. 88.

[3] See *Roberts and Schaefer Co.* v. *Emmerson* (1926), 271 U. S. 50, 54.

extent of such variation these measures, therefore, impose in fact a burden upon interstate commerce. Nevertheless, the position of the Court is that the effect upon interstate commerce is only incidental, and not from the constitutional standpoint a burden which invalidates the tax.

Since the privilege of engaging in a corporate capacity in business wholly within the state is one which may be granted or withheld by the state, it possesses the power to impose an excise tax upon the exercise of this privilege. The power, however, is very distinctly limited by the principle of *Western Union Telegraph Company* v. *Kansas* that such an excise tax may not be imposed upon foreign corporations, whose interstate and intrastate operations are not readily separable, if the tax is measured by elements which are not directly subject to state taxation.[1] This principle prohibits a method of assessment which includes the amount of a corporation's property located beyond the jurisdiction of the taxing state. Even when the tax purports to be measured only by the value of the corporation's property in the taxing state, the tax is invalid if the method of apportioning property values among the various states in which the corporation operates is faulty and results in including in the assessment values properly attributable to other states.[2] *Air-Way Electric Appliance Corporation* v. *Day,* decided in 1924,[3] furnishes another illustration of the principle that an excise tax imposed upon foreign corporations for the privilege of doing business within the state must not be measured by elements beyond the jurisdiction of the taxing state. This was an

[1] (1910), 216 U. S. 1. See pp. 199-203, *supra.*

[2] *Wallace* v. *Hines* (1920), 253 U. S. 66. The reasons for disapproving the method used in this case for the apportionment of property value have already been given in detail in the discussion of state power to tax property, p. 272, *supra.*

[3] 266 U. S. 71.

appeal from a judgment of a lower court which held that the state of Ohio had power to measure such a tax by the proportion of the *authorized* capital stock represented by property owned and used and business transacted in Ohio. In this case a Delaware corporation was authorized by its charter to issue 400,000 shares of no par value stock of which only 50,485 were outstanding. All of its property was located in Ohio and twenty-eight per cent of its business consisted of local sales, the balance being interstate transactions. The lower court sustained a tax of five cents a share upon 298,520 shares, taking that number because it bore the same ratio to 400,000 that the company's business done and property owned in Ohio bore to its total business done and property owned everywhere.[1] The United States Supreme Court held that this tax was invalid because there was included in its assessment shares of stock which were authorized but not issued, and therefore could not possibly represent anything within the taxing jurisdiction of Ohio. The Court would have had no objection to the ratio used in computing the portion of the corporation's capital representing property owned in and business done in Ohio, if it had been applied, not to the total *authorized* shares, but to the total *issued* shares of the corporation. Mr. Justice Butler said:

> The inevitable effect of the Act is to tax and directly burden interstate commerce of foreign corporations permitted to do business in Ohio, and engaged in interstate commerce, wherever the number of shares authorized, subject to the charge of 5 cents each, exceeds the number of outstanding shares attributable to or represented by the corporation's property and business in that state. In this case, the fee fixed by the commission

[1] $$400{,}000 \times \frac{\$458{,}278.56 \text{ (property in Ohio)} + \$70{,}802.30 \text{ (local Ohio business)}}{\$458{,}278.56 \text{ (total property)} + \$250{,}594.55 \text{ (total business)}}$$
$$= 400{,}000 \times 74.63\% = 298{,}520.$$

was based on nearly eight times the number of outstanding shares, and that determined by the Court on nearly six times that number. As some of the outstanding shares are represented by the plaintiff's interstate business, the application of the rate to all the shares, or to a number greater than the total outstanding, necessarily amounts to a tax and direct burden upon all the property and business, including the interstate commerce, of the plaintiff.[1]

The real meaning of this decision is perhaps clarified by Mr. Justice Stone, who thus interpreted it in a later case:

That case [the *Air-way Corporation* case] dealt with a privilege tax, laid by Ohio on a foreign corporation engaged in interstate and intrastate commerce in that and other states. . . . While one factor in the computation of the tax was properly the proportion of the corporation's business done and property owned within the state, the other factor was the amount of its authorized capital stock, only a part of which had actually been issued. The authority to issue its capital stock was a privilege conferred by another state and bore no relation to any franchise granted to it by the state of Ohio or to its business and property within that state. When authorized capital stock is taken as the basis of the tax, variations in the amount of the tax are obtained, according as the corporation has a large or small amount of unissued capital stock. This was held in the Air-Way Case, to be an unconstitutional discrimination, since it resulted in a tax larger than the tax imposed on other corporations with like privileges and like business and property within the state, but with a smaller capital authorized under the laws of the state of their creation.[2]

Out of the distinctly involved and complicated discussion of the *Air-Way Corporation* case there emerges a definite holding that a state excise tax upon a foreign corporation

[1] 266 U. S. at 82.

[2] *Roberts and Schaefer Co.* v. *Emmerson* (1926), 271 U. S. 50, 54.

engaged in interstate commerce must not be measured by capital stock, authorized by the state of its origin, but not issued.

While states are not permitted to measure a local excise tax on foreign corporations engaged in interstate commerce by elements which are not proper subjects of direct state taxation, the Court has usually followed the converse of this rule and sustained excise taxes upon engaging in intrastate business as a corporation, measured by elements which may be taxed directly by the states, although they may vary with the interstate business of the corporation. Thus it has been held that foreign corporations doing local business in a corporate capacity are subject to a state tax for the exercise of this privilege measured by the value of their property located in,[1] the amount of capital invested in,[2] or the portion of their net income attributable to their business in the taxing state.[3] Since a state may impose direct taxes upon property located therein and used in interstate commerce, or net income earned within the state from transactions of interstate commerce, it may also include such property or income in the measurement of local excise taxes upon foreign corporations.[4] The sole tests of the validity of state excise taxes upon foreign corporations measured by property or net income are that the corporation shall actually be engaged in intrastate business, and that the property or income used in measuring the tax shall be located in or earned in the taxing state; if these tests are fulfilled, the fact that

[1] *Underwood Typewriter Co.* v. *Chamberlain* (1920), 254 U. S. 113; *Southern Ry.* v. *Watts* (1923), 260 U. S. 519.

[2] See *Air-Way Corp.* v. *Day* (1924), 266 U. S. 71, 82; *Roberts and Schaefer Co.* v. *Emmerson* (1926), 271 U. S. 50, 54.

[3] *Underwood Typewriter Co.* v. *Chamberlain, supra*; *Bass, R. & G. Ltd.* v. *Tax Commission* (1924), 266 U. S. 271.

[4] *Underwood Typewriter Co.* v. *Chamberlain, supra.*

the property is used in interstate commerce, or that the income is derived therefrom, does not invalidate the tax.

In the case of foreign corporations engaged in business in several states, the use of any one of these measurements, property, invested capital, or net income, gives rise to a problem of apportionment, as there is no clean-cut test for making an exact allocation of any of these elements of a corporation's business to each of the various states in which it operates. We have already discussed in considerable detail the Court's attitude toward methods of apportioning property values.[1] The Court has indicated that the capital investment apportionable to the taxing state may be computed by taking the total amount of capital actually issued and applying to that the ratio of the property value and intrastate business done in the taxing state to the total property value and business done by the corporation in all states.[2] This gives a very complicated computation, but there is no reason to suppose that either one of the elements used in this complex ratio could not be used alone in apportioning capital investment; in other words, it seems proper to measure the amount of capital invested in the taxing state by applying to the total amount of capital actually issued by the corporation either the ratio of its property value in the taxing state to its total property value, or the ratio of the intrastate business transacted in the taxing state to its total business transacted. The apportionment of net income to the taxing state has been sustained on the basis of the ratio of the value of certain classes of property within the taxing state to the total value of the same classes of property owned by the corporation wherever located; in one case the real and tangible personal property of the corporation was used;[3] in

[1] See pp. 188-194, 271-273, *supra*.

[2] See *Air-Way Corp.* v. *Day*, pp. 279-282, *supra*.

[3] *Underwood Typewriter Co.* v. *Chamberlain*, *supra*.

another case, the assets used in computing the ratio included not only real and tangible personal property, but also bills and accounts receivable, and shares of stock owned in other corporations, of which the value was allocated according to the location of physical property represented by such stocks.[1] The underlying purpose in working out these various plans of apportionment is to get a fair workable measure of the property, capital investment, or net income of a foreign corporation properly apportionable to the taxing state, and the Court is disposed to sustain any method of apportionment which is reasonably calculated to accomplish this result.

In accordance with the principle that the state has power to levy a flat-sum license tax upon the transaction of intrastate business, even though the licensee may also be engaged in interstate commerce, the Court sustained a state license tax of $100 upon brokers or commission merchants buying or selling goods for another, who were definitely engaged in the business of making sales for resident principals, even though most of their business was for principals residing in other states.[2] In this decision, Mr. Justice Sutherland said that a tax upon a taxable business cannot be avoided by also engaging in a non-taxable business. A flat-sum tax upon the transaction of intrastate business may, of course, be a very real burden on interstate commerce in the case of corporations such as railroad and telegraph companies whose interstate and intrastate operations are not readily separable, if the tax substantially exceeds the profits from the intrastate business. Nevertheless, the Court held that a small license tax on a telegraph company for the privilege of doing intrastate business was not an unconstitutional burden on interstate commerce merely because the local business was unprofitable, but in reaching this decision the Court

[1] *Bass, R. & G. Ltd.* v. *Tax Commission, supra.*

[2] *Raley and Brothers* v. *Richardson* (1924), 264 U. S. 157.

laid stress upon the fact that the state had provided machinery for the increase of intrastate rates of which the company had not availed itself.[1] It may reasonably be inferred from this opinion that such a tax would be held unconstitutional if the company were unable to effect an increase in its local rates sufficient to absorb the tax and to prevent its becoming a charge upon its interstate revenues.

In summarizing the effect of United States Supreme Court decisions of this period, special emphasis must be placed upon the wide extension of federal power over intrastate transactions which was held to be authorized by the commerce clause of the Constitution. The power to regulate commerce between the states, according to these decisions, embraces federal legislation reasonably adapted to providing an adequate transportation system for the movement of interstate commerce. Since the adequacy of the transportation system depends upon the financial ability of the railroads to provide necessary facilities, the efforts of the federal government to protect the earning capacity and credit of interstate railroads were sustained, not only when they were directed to the regulation of interstate transactions, but also when they superseded state regulation of subjects which had been previously regarded as matters of purely local concern and which had no substantial connection with interstate commerce aside from their relation to the financial ability of the railroads to render adequate transportation service.

The federal policy of protecting the earning capacity and credit of interstate railroads found expression in many forms of regulative activity which met with judicial approval. Foremost among them was the regulation of the rate structure, both interstate and intrastate, with a view to providing a general level of rates which would produce a

[1] *Postal Telegraph-Cable Co.* v. *Fremont* (1921), 255 U. S. 124.

fair return upon the aggregate value of the railway property of carriers engaged in interstate transportation. To accomplish this result, Congress through the Interstate Commerce Commission was permitted to prescribe the general level of intrastate rates, and in so doing, to set aside, not only the orders of state regulatory commissions, but also the laws of the states and the contract obligations of state-granted charters. Since there is bound to be inequality between the rates of return earned by various carriers at the same general level of rates, Congress and the Interstate Commerce Commission have attempted to correct this inequality by such measures as the recapture of part of the net income earned in excess of the prescribed fair rate of return, and by the readjustment of the divisions of joint through rates between the participating roads. The Court sustained the constitutionality of these efforts, even as applied to earnings derived in part from intrastate traffic. The federal power to protect the earning capacity and credit of interstate railroads includes the power to authorize or prohibit their construction, extension or abandonment. This power may be validly exercised to prohibit the construction or authorize the abandonment of a part of a railroad lying wholly within one state, even for purely intrastate traffic, if the road is elsewhere engaged in interstate commerce. It does not, however, extend to a railroad transacting no interstate business. A similar form of federal authority which has been sustained by the Court, is the power to authorize or prohibit proposed issues of securities of interstate railroads; this may be the instrument of interference with state requirements for the improvement of local facilities and service which involve large capital expenditures necessitating the sale of stocks or bonds.

In this period there was no outstanding development in the judicial interpretation of the effect of the Constitution

itself upon the reserved powers of the states. It is true that the scope of state activity was severely restricted as a result of the various decisions sustaining federal action under the provisions of the Transportation Act of 1920. From the standpoint of constitutional interpretation, however, these decisions are significant only as the expression of a very broad conception of federal power, and add absolutely nothing to the doctrines previously established concerning the constitutional limitation upon state power. They merely apply to state legislation the fundamental Constitutional provision that the laws of the United States enacted in pursuance of the authority granted to Congress by the Constitution are the supreme law of the land. In considering the effect of the Constitution upon state power to regulate or otherwise to affect interstate commerce in ways not conflicting with federal legislation, the decisions of the Court in this period are merely applications of principles which had been evolved prior to 1920. We find no distinct trend in this process which would justify anything in the nature of a general summary statement of the effect of these decisions upon the reserved powers of the states. All that can be done in summarizing the discussion of this chapter, so far as it relates to state power, is to enumerate some of the more important applications of familiar principles.

The rule that the transportation and sale of commodities between the states is a subject requiring uniformity of regulation to be administered only by Congress has always proved troublesome and has never been rigidly enforced to the extent of forbidding all direct state regulation of this subject. Departures from the rule have been permitted where particular forms of regulation of interstate transportation and sale must be adjusted to local conditions. The Court appears willing to sustain direct state regulation of interstate transportation or sale where it is impressed with

the necessity for local control. This is shown by the decision upholding state regulation of retail sales of natural gas piped directly to the consumer from another state, and by the recognition of state power to regulate the construction and abandonment of spur, industrial, team, switching or side tracks wholly within one state and of street, suburban or interurban electric railways, even when these facilities are used or intended to be used for interstate transportation. It is frequently contended that interstate transportation by motor vehicle over the public highways is a subject requiring local regulation to meet local conditions. But this view is not accepted by the United States Supreme Court as is shown by recent decisions holding that the rule of exclusive Congressional jurisdiction over interstate transportation is applicable to the operation of motor vehicles between the states.

In the decisions considering the power of the states to affect interstate commerce indirectly by regulations primarily directed to their own internal affairs, we see the same balancing of local needs against the practical effect upon interstate transactions that was observed in the cases decided in previous periods. The Court is disposed to permit a considerable degree of interference with interstate commerce where the primary object of state legislation is local. This is shown by the decisions sustaining "Jim Crow" laws, laws requiring interstate railroads to provide additional facilities for intrastate transportation which do not involve large capital expenditures, and laws permitting resident creditors of non-resident interstate railroads to attach their property and accounts used in or derived from interstate transportation. On the other hand, the Court has refused to permit the states to stop or detour interstate trains for the accommodation of local traffic otherwise adequately served, to require companies engaged in both interstate and intrastate

commerce to give preference to their local patrons, or to give their courts jurisdiction over non-resident interstate carriers in suits by non-resident plaintiffs on causes of action arising outside of the state.

In the field of taxation, the prohibition of state taxes upon the operations of the United States or its agencies in the execution of federal laws has been made more stringent by the recent decisions that the net income of such agencies is not subject to a state income tax and that a state property tax may not be assessed upon property in which the Indian wards of the United States have an equitable interest. The latter decision, however, is not to be interpreted as meaning that agencies of the United States are entirely exempt from state property taxes.

In dealing with the difficult problem of determining what state taxation is an unconstitutional burden upon interstate commerce, the Court in recent decisions has made it clear that a state may include in the assessment of a general income tax the net income from transaction of interstate commerce earned within its borders by either residents or non-residents. Since such income may be taxed directly, it may also be used as the measure of other valid forms of state taxation such as excise taxes upon the transaction of intrastate business by foreign corporations. Although permitting the income from interstate commerce to be taxed by the states, the Court still firmly adheres to the rule that interstate business itself is exempt from state excise or occupation taxes. It has decided that the rule is violated, not only by taxes upon actual interstate transportation or sales, but also by taxes upon occupations incidental thereto, such as the business of conducting a ticket agency for the sale of tickets to destinations outside of the state. Where foreign corporations are concerned, no distinction is made between an excise tax upon interstate business, as such, and an excise

tax upon the transaction of such business in a corporate capacity. The latter has been held to be as direct a burden upon interstate commerce as the former.

In the application of the rule of *Western Union Telegraph Company* v. *Kansas*, that a state must not measure its excise taxes upon the transaction of intrastate business by elements themselves beyond its jurisdiction, the Court has continued to subject the measurement of such taxes to the closest scrutiny. It has permitted the use of property located in the taxing state or capital invested therein as a basis of assessment, but has carefully checked the method of computing these elements to see that capital or property in other states is not included. In the case of foreign corporations, the use of capital authorized but not issued has not been permitted in assessing a state excise tax because the bare authority to issue capital represents nothing subject to the jurisdiction of the taxing state. A lump-sum fee exacted from foreign corporations engaged in interstate commerce for the privilege of doing intrastate business has been sustained where it does not exceed the intrastate profits or where the corporation has not exhausted the statutory remedies for the increase of intrastate rates.

The foregoing summary is merely a résumé of judicial interpretation since 1920 for the purpose of emphasizing the more important developments of the period affecting the relations of the state and federal governments in the control of interstate railroads. It does not purport to give a comprehensive view of the present status of the distribution of authority between the states and the nation. Before this can be done it is necessary to survey existing federal legislation which has narrowed the scope of state power by extending the exercise of Congressional power to subjects which the states would be permitted to regulate in the absence of conflicting federal laws. This will be the subject of the next chapter.

CHAPTER V

Federal Laws Affecting State Power

In determining whether state action regulating or affecting interstate carriers is valid, there are two distinct problems. The first is to ascertain the effect of the Constitution itself upon state powers. State action regulating certain subjects of interstate commerce is held by the United States Supreme Court to be unconstitutional for the sole reason that the Court interprets the Constitution as giving Congress exclusive power to regulate those subjects, and entirely irrespective of whether Congress has exercised its power. The decisions which thus limit state powers have already been discussed. These subjects over which federal jurisdiction is exclusive occupy what we have designated as the zone of exclusive jurisdiction from which state action is barred even if not in actual conflict with congressional enactments. The preceding chapters have also shown that the Constitution is interpreted as establishing a zone of concurrent jurisdiction in which both Congress and the states may act provided that their actions do not conflict. But if conflict arises in this zone of concurrent jurisdiction, the state action becomes invalid under the provisions of Article VI, Section 2, of the Constitution declaring that the Constitution and the laws of the United States made in pursuance thereof shall be the supreme law of the land. The definition of the limits of this zone is a matter of constitutional interpretation and has therefore been considered in the preceding chapters. The discussion, however, has heretofore made no attempt to show the extent to which Congress has interposed obstacles to the exercise of state powers within these limits.

This leads us to the second problem in determining the validity of state action. This is to ascertain the restraints which have been imposed upon the exercise of state powers by laws enacted by Congress and which invalidate state legislation that would have been sustained if Congress had remained silent. The present chapter is devoted to the discussion of the extent to which the states have thus been excluded from authority to act in the zone of concurrent jurisdiction by the operation of laws of the United States. The more important federal legislation concerning interstate railroads will be reviewed, together with the Court's interpretation of the intention of Congress as indicated therein, in so far as it affects the states' authority to continue to act with respect to the same subjects.

The problem of determining the effect of congressional action upon state powers would be comparatively simple if the laws enacted by Congress and the orders of subordinate federal agencies made in pursuance thereof operated only to deprive the states of authority to make laws and orders in direct conflict therewith. But federal legislation, as interpreted by the United States Supreme Court, in many cases, places a far greater restraint upon state powers. According to these decisions, Congress, by legislating upon a particular subject of interstate commerce, not only deprives the states of power to act in direct conflict with the federal law, but also assumes complete jurisdiction of the subject matter of the legislation, so that any further state action in relation thereto is invalid. This is illustrated by the Court's attitude toward state regulation of liability to employees engaged in interstate transportation as affected by the Federal Employers Liability Act of 1908.[1] The Act by its terms regulated only liability arising from injuries or death due to negligence or to violations of the provisions of federal statutes

[1] 35 Stat. L. 65.

requiring safety appliances. Obviously it precluded the enforcement of state legislation establishing a conflicting rule of liability arising from these causes. But the Court held that Congress, by this Act, had assumed complete jurisdiction of the regulation of liability to employees engaged in interstate commerce arising from injuries or death, and therefore refused to permit the enforcement of state legislation providing for compensation to interstate employees for accidental injuries to which neither negligence nor defective appliances contributed, although such legislation did not directly conflict with the federal law.[1] The theory is that Congress, by legislating upon a particular subject, indicates its intention that the subject shall be unregulated except as provided by congressional enactment; state action relating thereto, although not in conflict with the express provisions of federal law, is considered to conflict with the implied intention of Congress. This theory, however, must not be given too broad an application. For example, it might lead to the implication that Congress, by conferring upon the Interstate Commerce Commission power to regulate interstate transportation in a variety of ways, had intended to deprive the states of all jurisdiction to regulate matters incidental to such transportation. That such was not the interpretation of the Act is indicated by the following statement of the Court:

> The mere grant by Congress to the Commission [Interstate Commerce Commission] of certain national powers in respect to interstate commerce does not itself, and in the absence of action by the Commission, interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens. Running through the entire argument of counsel for the Missouri Pacific is the thought that the control of Congress over interstate commerce, and a delegation of that

[1] *New York Central R. R.* v. *Winfield* (1917), 244 U. S. 147.

control to a commission, necessarily withdraws from the state all power in respect to regulations of a local character. This proposition can not be sustained. Until specific action by Congress or the Commission, the control of the state over those incidental matters remains undisturbed.[1]

The opinion containing this statement sustained the authority of a state to require an interstate carrier to furnish non-discriminatory local switching service to shippers, including the switching of cars to be used for interstate shipments, a duty which the state "may—at least, in the absence of congressional action,—compel a carrier to discharge". This shows that there is a very real difficulty in determining how much restraint is placed upon state power by any particular federal legislation. State action directly in conflict with the express terms of the federal statute is clearly prohibited. But we must also consider the implication that Congress, by legislating upon a particular subject, has indicated its intention to assume exclusive control of that subject, precluding any state regulation thereof. This implication varies in its effect upon state powers with the breadth of our definition of the subject matter over which Congress intends to assert exclusive jurisdiction. In any case it is a question of the interpretation of the intention of Congress in each particular statute for which no precise rule can be stated. For example, if we find that Congress in the Employers' Liability Act has intended to regulate the entire subject of liability to employees engaged in interstate commerce, we preclude much state action which would be permitted if we should give the subject of the act a narrower definition such as liability for injuries or death resulting from negligence or defective safety appliances. State action has been repeatedly challenged upon the ground that Congress has assumed exclusive

[1] *Missouri Pacific Ry.* v. *Larabee Flour Mills Co.* (1909), 211 U. S. 612, 623.

control of the subject; in some cases the state laws or orders have been sustained, and in others they have been held invalid. The resulting decisions give a definite interpretation of the effect of many federal statutes upon state powers. With respect to other statutes concerning which the Court has not been called upon to act, we must seek enlightenment from any source that will indicate what Congress really meant to accomplish by the legislation, or, in default of definite evidence of congressional intention, from the most analogous decisions of the Court.

Congressional legislation regulating or affecting interstate carriers is now so extensive in its effects that much of the authority formerly possessed and exercised by the states has vanished. This applies not only to the legislative and administrative functions of the states, but also to the power of the states to enforce in their courts both common-law and statutory remedies applicable to transactions of interstate commerce. Among the subjects which must be discussed in considering the effect of congressional action upon state power are included the charges for transportation, the liability of carriers to shippers and passengers, transportation service and facilities, the safety of passengers and employees, the liability of carriers for the injury or death of their employees, and the finances and management of carriers. Each of these subjects falls partly or wholly within the reserved powers of the states in the absence of congressional action, and each has been regulated by federal authority. This chapter will take up separately the various subjects which have just been enumerated. The relevant federal legislation on each subject will be outlined, and an attempt will be made to interpret its effect upon state power with the assistance of the United States Supreme Court decisions.

The federal statutes are not applicable to the same extent to all classes of carriers. Steam railroads, including the elec-

trically operated parts of steam railroad systems, interurban electric railroads, railroad ferries, carriers by water engaged in transportation in connection with railroads under a common control, management, or arrangement for a continuous carriage or shipment, express companies, sleeping-car companies, and pipe lines transporting oil or other commodities, except water and natural or artificial gas, are all subject to the general provisions of the Interstate Commerce Act if they are engaged in interstate transportation.[1] On the other hand, the Act in general does not apply to ordinary street electric railways,[2] carriers by motor vehicle on the public highways, or carriers by water not engaged in transportation in connection with railroads under a common control, management or arrangement for a continuous carriage or shipment. Particular sections of the Interstate Commerce Act or other federal legislation have a wider or narrower application according to their express provisions. The discussion which follows, will point out various limitations imposed upon the reserved powers of the states by federal legislation. Unless expressly qualified in the discussion, these limitations affect state power to regulate the classes of carriers engaged in transportation to which the general provisions of the Interstate Commerce Act apply and no others.[3] Care will be taken

[1] Interstate Commerce Act, Section 1 (1) (2) (3). This and other citations of sections of the Interstate Commerce Act refer to the text as published by the Interstate Commerce Commission revised to August 1, 1926. (Washington, Government Printing Office, 1926).

[2] See *Omaha and Council Bluffs Street Ry.* v. *Interstate Commerce Commission* (1913), 230 U. S. 324; *United States* v. *Village of Hubbard* (1925), 266 U. S. 474.

[3] The Interstate Commerce Act includes telegraph, telephone and cable companies in its definition of the term "carrier." Sec. 1 (3). Its general provisions therefore apply to such companies. The present discussion, however, makes no attempt to include these so-called "carriers" engaged in the transmission of intelligence, and uses the term "carrier" in its more common meaning as designating an agency of transportation.

to point out express provisions of federal laws which exclude from their operation classes of carriers subject to the general provisions of the Interstate Commerce Act or include other classes of carriers.

Charges for Transportation

Federal regulation of the charges for transportation commenced with the Interstate Commerce Act of 1887.[1] This exercise of federal power was made necessary by the decision of the United States Supreme Court in the *Wabash Railway* case which established the rule that Congress alone has power to regulate charges for interstate transportation.[2] At that time the public, particularly in the granger states, was intensely aroused by the practices of the railroads of which the most flagrant was discrimination in transportation charges. Since the Court had denied the power of the states to enforce statutes to protect the shippers from these abuses, it became incumbent upon Congress to act.

It must not be supposed that the states, in the absence of congressional action, were wholly without power to protect shippers from unjust and discriminatory charges. In addition to complete authority to regulate transportation wholly within their borders, the states through their courts could enforce the common-law obligations of common carriers which include the duty to furnish interstate transportation at reasonable rates and, in some states, to furnish such transportation without discrimination.[3] This was done by rendering judgment in favor of injured shippers for the actual loss or damage sustained by the imposition of unjust or discriminatory charges. The common-law remedy, however,

[1] 24 Stat. L. 379.

[2] (1886), 118 U. S. 557. See p. 95, *supra*.

[3] *Covington and Cincinnati Bridge Co.* v. *Kentucky* (1894), 154 U. S. 204, 222; *Western Union Tel. Co.* v. *Call Publishing Co.* (1901), 181 U. S. 92. See p. 166, *supra*.

was wholly inadequate. Besides the expense and delay imposed upon each shipper in obtaining relief, there was another serious disadvantage in this method of enforcing the carriers' obligations. The judgment of the Court was binding upon the carrier only with respect to the particular shipment or shipments involved in the litigation, and in no sense fixed the level of rates which the carrier could legally impose. Other shippers, or the same shippers with respect to other transactions, had to repeat the same long and expensive process of bringing suit against the carrier, if they believed that its charges were illegal. Furthermore, legal proof of the actual damage suffered was difficult, particularly in cases arising from discrimination. Under these circumstances the vast majority of shippers were loath to undertake the burden of bringing suit; therefore, the fear of litigation and the resulting judgments proved a totally inadequate sanction to compel the observance of the carriers' obligations. The situation demanded an efficient and expeditious method of procedure, which not only would secure prompt reparation to injured shippers, but also would define and enforce the carrier's obligations for the benefit of all shippers by providing specific scales of maximum charges which the carriers could not legally exceed.

The original Interstate Commerce Act failed to meet these requirements because it did not give the Interstate Commerce Commission the power to prescribe the rates which must be observed by the carriers in the future, but only the power to order them to cease and desist from enforcing particular charges found by the Commission to be unreasonable and to make reparation for injuries done.[1] Subsequent amendments, however, have evolved a very comprehensive plan of federal regulation. The Act, as now amended, contains numerous provisions concerning interstate rates, and it would confuse the present discussion to quote them in full. At this

[1] See 24 Stat. L. 379, 384.

point it is sufficient to outline the federal plan of rate regulation to show how it protects the shippers from abuses in connection with charges for interstate transportation and supplants the former common-law rules which were enforceable in the state courts. The Act prohibits unjust and unreasonable interstate charges, classifications, regulations and practices.[1] It defines and prohibits unjust discrimination in interstate charges.[2] For any violation of these requirements, it imposes upon carriers liability in civil damages to shippers for the full amount of damages sustained and a reasonable attorney's fee.[3] Carriers are required to file with the Commission, print and keep open to public inspection schedules showing all their charges for interstate transportation and the classifications and regulations which affect such charges.[4] Any departure from the published rates is prohibited and severely penalized.[5] The Act gives to the Interstate Commerce Commission the power to determine whether any interstate charge, classification, regulation or practice concerning such charge is unjust, unreasonable, unduly discriminatory, or otherwise in violation of the Act; to prescribe the rates, charges, classification, regulations and practices to be observed in the future; and to order the carriers to cease and desist from violations of the Act thus found by the Commission to exist, and to observe the charges, regulations or practices prescribed by the Commission.[6] Such orders are enforceable by injunction proceedings in the federal courts, and a heavy penalty is imposed for their violation.[7] The Commission may exercise this power after

[1] Section 1 (5) (6).

[2] Section 2.

[3] Section 8.

[4] Section 6 (1).

[5] Sections 6 (7), 10 (1) (2), Elkins Act (32 Stat. L. 847), Section 1.

[6] Section 15 (1).

[7] Section 16 (7) (8) (12).

hearing, either upon the complaint of shippers, civic and commercial organizations, or state commissions, or in a proceeding instituted by the Commission upon its own motion.[1] The power is applicable, not only to tariff provisions in effect when it is exercised, but also to any proposed charge, or classification, regulation or practice affecting a charge, stated in schedules filed with the Commission in advance of their effective date as required by the provisions of the Act; the Commission may suspend such schedule, and after investigation and hearing make such order with reference thereto as would be proper in a proceeding initiated after it had become effective.[2] In addition to the rate-making powers thus outlined, the Commission is authorized to determine the damages to which any complainant is entitled for a violation of the Act and to make an order directing the carrier to pay to the complainant the sum to which he is entitled.[3] Such order is enforceable either in a district court of the United States or in a state court of general jurisdiction having jurisdiction over the parties.[4]

The Act thus provides comprehensive remedies to protect shippers from unreasonable and discriminatory charges for interstate transportation. Are these remedies supplementary to or exclusive of the old common-law remedies enforceable in the state courts? The Act itself seems to give an unequivocal answer to this question; it says: "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."[5] The Supreme Court, however, held in *Texas and Pacific Railway* v. *Abilene*

[1] Sections 13 (1) (2), 15 (1).

[2] Section 15 (7).

[3] Section 16 (1).

[4] Section 16 (2).

[5] Section 22 (1).

Cotton Oil Company[1] that a shipper may not bring suit in the state courts, based on his common-law right to be charged reasonable rates, for the recovery of the excess paid over a reasonable rate of transportation, where the rate charged was that specified for interstate transportation in accordance with published tariffs filed as required by the Interstate Commerce Act. For redress the shipper must proceed by complaint before the Interstate Commerce Commission. The opinion of the Court by Mr. Justice White states:

> The existence of such a power [to hold a published rate unreasonable and award reparation] in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. . . .
>
> If the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. . . . Thus a conflict would arise which would render the enforcement of the act impossible. . . .
>
> The contention now made, if adopted, would necessitate the holding that a cause of action in favor of the shipper arose from the failure of the carrier to make an agreement, when, if the agreement had been made, both the carrier and the shipper would have been guilty of a criminal offense and the agreement would have been so absolutely void as to be impossible of enforcement.[2]

The conclusion reached was that the common-law right of action in the courts to recover damages resulting from unreasonable charges, as applied to charges made in accordance

[1] (1907), 204 U. S. 426.

[2] 204 U. S. at 441, 445.

with published tariffs, is so entirely inconsistent with the objects and purposes of the Interstate Commerce Act that it must be deemed to have been repealed by implication.[1]

This decision, however, must not be interpreted as depriving the shippers of all remedies with respect to unjust or discriminatory charges except those provided by the federal statutes. Subsequent cases make it clear that the determining consideration in the *Abilene* case was the fact that the shipper's right to damages depended upon a ruling concerning the reasonableness of the charges published and enforced by the carrier.[2] This was regarded as a matter of administrative discretion for which there must be a single arbiter in order to avoid contradictory rulings. The Interstate Commerce Commission having been authorized to make this administrative determination, the procedure prescribed by statute for obtaining the decision of that body must be followed. But occasions may arise in which the shipper's right to recover damages does not depend upon the exercise of administrative discretion. For example, unjust discrimination may result from charges against a particular shipper exceeding the rates published and filed by the carrier as prescribed by statute, or from a departure from published classifications, regulations or practices. In such cases no administrative act of the Commission would be necessary to establish the existence of discrimination, and it, therefore, seems that the enforcement by the state courts of common law or statutory remedies existing at the time the Interstate Commerce Act became a law would be permissible under the provision of the Act preserving existing remedies.[3] Thus

[1] *Accord, Texas and Pacific Ry.* v. *Cisco Oil Mill* (1907), 204 U. S. 449.

[2] See *Pennsylvania R. R.* v. *Puritan Coal Mining Co.* (1915), 237 U. S. 121, 130, 131; *Illinois Central R. R.* v. *Mulberry Hill Coal Co.* (1915), 238 U. S. 275, 282.

[3] Section 22 (1); see *Pennsylvania R. R.* v. *Puritan Coal Mining Co.*, *supra*; *Illinois Central R. R.* v. *Mulberry Hill Coal Co.*, *supra.*

the Act may safely be interpreted as repealing the common law remedies for unreasonable or discriminatory charges previously enforceable by the state courts only in those cases in which an administrative determination of the reasonableness or fairness of the published tariff provisions of the carrier is involved. But when the carrier discriminates against a shipper by violation of the provisions of its own tariffs, the shipper's right to relief may be established without the exercise of administrative discretion and the remedies provided by the Act are in addition to and do not repeal the previous common-law or statutory rights which the shipper may enforce in the state courts.

Among the most controversial questions concerning the division of state and federal power are those which arise from federal regulation of charges for intrastate transportation. The Interstate Commerce Act specifically declares that its provisions shall not apply " to the transportation of passengers or property or to the receiving, delivering, storage, or handling of property, wholly within one state ".[1] The most that can be said for this proviso is that it prohibits federal action regulating intrastate transportation which is not expressly authorized by other parts of the Act. The Act makes it unlawful for any common carrier subject to its provisions " to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever ".[2] The prejudices and disadvantages must of course be interpreted as meaning those affecting interstate transportation. But it is obvious that particular interstate shippers or particular descriptions of interstate traffic may be subjected to unreasonable prejudice or disadvantage by the movement of competing intrastate

[1] Section 1 (2) (a).

[2] Section 3 (1).

traffic for similar distances at substantially lower rates. It is true that the federal authorities could protect interstate shippers and traffic from such prejudices or disadvantages without interfering with intrastate rates by the simple expedient of ordering reductions of interstate rates, if the proposed reductions are not confiscatory. But relief by reduction of particular interstate rates may have far-reaching and disastrous effects upon interstate commerce. In the first place the interstate traffic against which prejudice or disadvantage is claimed may be moving at rates which can not be reduced without depriving the carriers of adequate compensation for their services. In the second place the process of reducing a few interstate rates is apt to disturb the general rate structure by creating other discriminatory situations which in turn must be removed by other reductions, and before a satisfactory adjustment is obtained, the carriers' interstate revenues may be very substantially diminished. To remove prejudices and disadvantages to particular interstate traffic without seriously disturbing the interstate rate structure and the revenues derived therefrom often absolutely requires federal regulation of intrastate rates.

The mere enactment of this provision of the Interstate Commerce Act prohibiting discrimination against particular persons, localities, or descriptions of traffic did not interfere with the continued exercise of state authority to regulate rates for exclusively intrastate traffic.[1] In other words, the subject over which Congress thus asserted its jurisdiction to the exclusion of state power was not intrastate rates in general, but only those intrastate rates found by the Commission to cause prejudice or disadvantage to particular interstate traffic. It was therefore held that, until the Interstate Commerce Commission acts to protect particular interstate shippers or traffic from discrimination, an intrastate

[1] *Minnesota Rate Cases* (1913), 230 U. S. 352, 420, 421.

rate fixed by state authority may not be attacked in the courts on the ground that it causes undue or unreasonable prejudice or disadvantage to such shippers or traffic.[1] But when the Commission does act to declare certain interstate rates unduly prejudicial to the interstate commerce of particular shippers or localities and to prescribe the relation between those rates and authorized interstate rates, then the further exercise of state power to regulate the charges for the intrastate traffic embraced within the federal order is precluded by reason of the exercise of the power of Congress under the commerce clause, which is paramount.[2] While this particular form of exercise of federal power was at first vigorously resisted as an unwarranted invasion of the reserved powers of the states, the opposition has practically disappeared with the recognition of its necessity for the adequate protection of interstate shippers and traffic. It is now generally conceded that it is not only constitutional but advisable to permit the Interstate Commerce Commission to override state authority in those particular cases in which discrimination against persons and localities in interstate commerce is found to exist.

The Transportation Act of 1920, however, extended the exercise of federal authority over charges for intrastate transportation far beyond the removal of particular discriminations against interstate commerce. Prior to 1920 the authority of the Commission to protect interstate commerce from the effects of intrastate rates was limited by the Interstate Commerce Act to those which subjected "any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever".[3]

[1] *Minnesota Rate Cases, supra.*

[2] *Houston, E. & W. T. Ry.* v. *United States* (1914), 234 U. S. 342.

[3] Section 3, 24 Stat. L. 379, 380.

The Act of 1920 inserted a paragraph in the Interstate Commerce Act which expressly authorizes the Interstate Commerce Commission to remove "any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or *any undue, unreasonable, or unjust discrimination against interstate or foreign commerce*", by prescribing charges, classifications, regulations or practices in place of those imposed by state authority causing such advantages, preference, prejudice, or discrimination.[1] The italicized words would be meaningless if they did not extend the power of the Commission beyond the mere protection of particular persons or localities from discrimination. They have been construed by the Court as granting to the Commission the power to remove unjust discrimination against interstate commerce as a whole.[2] Its exercise developed in connection with the application of Section 15a of the Interstate Commerce Act, also added by the 1920 amendments. This section, it will be recalled, authorized and directed the Commission to establish rates so that the railroads as a whole in each of the rate groups designated by the Commission will earn a fair return upon the aggregate value of their railway property. Section 15a applies only to steam railroads, electric railways operated as a part of a general steam-railroad system, and interurban electric railways engaged in the transportation of freight.[3] At the outset the Commission's action under this section was an order directing a general horizontal increase of the *interstate* rates in each designated group of railroads.[4] In mak-

[1] Section 13 (4). Italics mine.

[2] *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. R.* (1922), 257 U. S. 563.

[3] Section 15a (1).

[4] *Ex Parte 74* (1920), 58 I. C. C. 220.

ing this order the Commission clearly contemplated that the intrastate rates in each group would be proportionately increased. In many instances, however, the state authorities refused to authorize or permit corresponding increases in intrastate rates, and at this point the new power to remove discrimination against interstate commerce as a whole was extensively and vigorously exercised by the Commission. This discrimination was found to exist because intrastate traffic moving at the lower rate levels prescribed by state authorities would pay less than its fair share towards providing the fair return upon aggregate property value contemplated by the federal law. Unless the Commission could compel an increase in the intrastate rates, it could not discharge its statutory duty of establishing rates yielding a fair return without imposing upon interstate traffic more than its fair share of the burden. The resulting situation was, therefore, clearly discriminatory against interstate commerce as a whole, regardless of its effect upon particular persons or localities, and the Commission endeavored to remove this discrimination by a series of orders relating to twenty-five different states which in substance directed the railroads to place their interstate and intrastate rates upon the same general level.[1]

The decisions sustaining the constitutionality of this exercise of federal power have already been discussed.[2] We are here particularly interested in estimating its effect upon state power. The net result is that with respect to interstate railroads subject to the provisions of Section 15a the states may no longer establish general levels of charges for intrastate transportation substantially lower than those prevailing for similar interstate transportation as established by the

[1] These cases are reported in volumes 59 to 64, inclusive, of the Interstate Commerce Commission Reports.

[2] See pp. 234-238, *supra*.

Interstate Commerce Commission pursuant to that section. State power to regulate intrastate rates nominally still remains. But if any marked discrepancy between the charges for interstate and intrastate transportation develops from such regulation, the carriers will invariably apply to the Interstate Commerce Commission for relief; their application, if the Commission finds discrimination against interstate commerce, will result in a federal order definitely fixing the general level of intrastate rates and thereby removing it from the control of the states. State legislatures or commissions find their hands tied so far as general reductions of intrastate rates are concerned, by the certainty that the power of the Interstate Commerce Commission will be invoked to prevent the enforcement of state regulation of this character. It is, therefore, the shadow and not the substance of power that remains to the states. With the exception of unusual cases where intrastate rates are on a substantially higher basis than interstate rates, the general level of the charges for transportation wholly within a single state is controlled by the interstate rate structure, and not by state authority, for railroads engaged in interstate commerce which are either operated by steam or as a part of a general steam railroad system or are interurban electric railways engaged in the general transportation of freight.

So far as such railroads are concerned the only effective rate-making power that still remains in state legislatures and commissions is the power to make minor adjustments in the intrastate rate structure which do not substantially affect the aggregate revenue derived from intrastate transactions. The Supreme Court has declared that the Interstate Commerce Commission must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level which the Commission has found to be fair to interstate commerce.[1] This clearly im-

[1] *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. R.* (1922), 257 U. S. 563, 591.

plies that state power remains to iron out injustices or discriminations in the intrastate structure by compensatory increases and reductions in particular rates or classes of rates.

Both the Commission and the Court also recognized the fact that the horizontal increases ordered by the Commission would in some particular instances reduce instead of increase the carrier's revenue because of the diminution of traffic resulting therefrom. The power to correct this situation, however, was retained by the Interstate Commerce Commission, which attached to its orders establishing general levels of intrastate rates a saving clause preserving the right of state authorities or any other party in interest to apply to the Commission for a modification of its findings and order as to any specified intrastate fares or charges on the ground that the latter are not related to the interstate fares or charges in such a way as to contravene the provisions of the Interstate Commerce Act.[1]

Liability to Shippers and Passengers

Closely related to the power to regulate the rates charged for transportation is the power to regulate the carriers' liability to shippers and passengers for failure to perform their obligations in connection with transportation service. The connection between these two subjects is particularly close where the rates charged for transportation service vary with the extent of the carrier's liability. In the absence of congressional action, the states have the power to regulate the liability of carriers to their shippers and passengers even when it arises from transactions of interstate commerce.[2] In 1906 Congress enacted the Carmack amendment to the Interstate Commerce Act,[3] which was followed by the Cum-

[1] See *Wisconsin Passenger Fares* (1920), 59 I. C. C. 391, 397.

[2] See pp. 92, 164, *supra*.

[3] 34 Stat. L. 584, 595.

mins amendments of 1915[1] and 1916[2] and subsequent amendatory legislation all of which is now embodied in Section 20, paragraphs (11) and (12), of the present Interstate Commerce Act. These sections provide in substance that a carrier receiving property for interstate transportation shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to the property caused by the receiving carrier or any other carrier transporting the property on a through bill of lading; that such liability shall be for the full actual loss, damage or injury, except in the case of baggage or of property other than ordinary live stock for which the Interstate Commerce Commission has authorized rates of transportation dependent upon the declared value of the property, in which case the recovery is limited to an amount not exceeding the declared value; and that no contract or other limitation of any character whatsoever shall exempt the receiving carrier from the liability thus imposed. The receiving carrier is given the right to recover from any connecting carrier, on whose line the loss, damage or injury shall have been sustained, the amount that the receiving carrier is required to pay under these provisions.

The Supreme Court has held that this legislation indicates the intention of Congress to establish a uniform rule on the subject of carriers' liability for interstate freight shipments and that, therefore, all state laws relating thereto have become inapplicable.[3] The original legislation of 1906

[1] 38 Stat. L. 1196.

[2] 39 Stat. L. 441.

[3] *Adams Express Co.* v. *Croninger* (1913), 226 U. S. 491; *Wells, Fargo & Co.* v. *Neiman-Marcus Co.* (1913), 227 U. S. 469; *Kansas City Southern Ry.* v. *Carl* (1913), 227 U. S. 639; *Missouri, K. & T. Ry.* v. *Harriman* (1913), 227 U. S. 657; *Chicago, R. I. & P. Ry.* v. *Cramer* (1914), 232 U. S. 490; *Boston and Maine R. R.* v. *Hooker* (1914), 233 U. S. 97; *Atchison, T. & S. F. Ry.* v. *Robinson* (1914), 233 U. S. 173; *Atchison, T. & S. F. Ry.* v. *Moore* (1914), 233 U. S. 182; *Southern Ry.* v. *Prescott* (1916), 240 U. S. 632.

contained no express provisions authorizing limitation of liability to the declared value of shipments where reduced rates were applied on account of such limitation. Nevertheless, the Court refused to sustain a state statute prohibiting such limitation of liability in a case arising from an interstate shipment.[1] The mere fact that Congress had legislated upon the subject of liability was considered sufficient to deprive the states of the power to regulate the rule of liability, and the Court, therefore, applied the common-law rule sustaining a contract provision restricting the amount of recovery to the declared value of the shipments where rates were based on such value.[2] The Cummins amendment of 1916[3] gave statutory expression to this common-law rule and any state legislation prohibiting limitation of liability to the declared value of interstate shipments where rates are based thereon would now conflict with the express provisions of federal law.

The federal legislation, in addition to depriving the states of the power to regulate the rule of the liability for interstate shipments by statute, placed other restrictions upon state authority. It was construed to assert federal jurisdiction over the entire subject of carriers' obligations in connection with interstate shipments to such an extent that a state statute imposing a penalty on carriers for failure to settle or adjust claims within forty days after their presentation was held to conflict with the provisions of federal law.[4]

[1] *Adams Express Co.* v. *Croninger, supra.*

[2] *Ibid.* The common law rule was stated and applied by the Supreme Court in *Hart* v. *Pennsylvania R. R.* (1884), 112 U. S. 331, 343.

[3] 39 Stat. L. 441.

[4] *Charleston and Western Carolina Ry.* v. *Varnville Furniture Co.* (1915), 237 U. S. 597. But see p. 314, *infra,* and *Missouri, K. & T. Ry.* v. *Harris,* there cited, to the effect that a state may require the payment of a compensatory allowance for attorney's fees when the carrier unreasonably delays the payment of a just demand.

The duty of the carriers to issue bills of lading for interstate shipments and their responsibilities thereunder would, as a practical matter, be regulated just as much by the enforcement of local and peculiar common-law rules of liability as by the enforcement of state statutes. It was accordingly held that the state courts must not apply local common-law rules giving to holders of bills of lading greater rights than they would receive under the general commercial law on the subject.[1] Congress, having asserted its power over this subject by the Carmack amendment, indicated its intention that a uniform plan of regulation must prevail, and that where that plan results from the enforcement of common law instead of statutes, the rules applicable must be those generally recognized by the federal courts and not local state rules in conflict therewith. This case involved the additional point that the liability which the transferee of the bill sought to enforce did not arise from loss or damage to the freight, but from his reliance on an erroneous statement in the bill of the date of shipment, which, however, was known by the original shipper. It was contended that the federal law regulated only liability for loss or damage and therefore did not supplant local rules concerning other forms of liability. On this point Chief Justice White said:

> But this ignores the view expressly pointed out in the previous decisions dealing with the Carmack Amendment, that its prime object was to bring about a uniform rule of responsibility as to interstate commerce and interstate commerce bills of lading,—a purpose which would be wholly frustrated if the proposition relied upon were upheld. The principal subject of responsibility embraced by the act of Congress carried with it necessarily the incidents thereto.[2]

[1] *Atchison, T. & S. F. Ry.* v. *Harold* (1916), 241 U. S. 371.

[2] 241 U. S. at 378.

Since the federal legislation applies to the baggage of interstate passengers as well as to freight shipments, it has been held that the states are without power to prohibit the enforcement of contract provisions limiting a carrier's liability for loss of or damage to such baggage.[1]

The Carmack and Cummins amendments by their terms do not apply to shipments from points in the United States to non-adjacent foreign countries. The Interstate Commerce Act, however, provides that carriers subject to its provisions shall establish, observe and enforce just and reasonable regulations and practices affecting the issuance form and substance of tickets, receipts and bills of lading.[2] The Court held that this general legislation is sufficiently broad to cover contractual provisions in a bill of lading for the interstate transportation to a sea-port of freight consigned to a non-adjacent foreign country, so as to render inoperative the provisions of a state statute prohibiting the limitation or abrogation of the common-law duties or liabilities of the carrier, so far as such statute would prevent provisions against liablity for loss by fire.[3]

In addition to the provisions of the Interstate Commerce Act on the subject of liability for loss or damage to interstate shipments, Congress enacted the Bills of Lading Act of August 29, 1916,[4] which further regulates the rights and obligations arising under bills of lading issued by common carriers for interstate transportation. The provisions of the Interstate Commerce Act relate primarily to liability for loss, damage or injury to interstate shipments. The Bills of Lading Act regulates in detail the form of bills of lading

[1] *Boston and Maine R. R.* v. *Hooker* (1914), 233 U. S. 97; *Galveston, H. & S. A. Ry.* v. *Woodbury* (1920), 254 U. S. 357.

[2] Section 1 (6).

[3] *Missouri Pacific R. R.* v. *Porter* (1927), 273 U. S. 341.

[4] 39 Stat. L. 538.

and the respective rights of carriers, shippers and holders of the bills to the title or possession of goods covered by them. This act governs bills of lading issued by any common carrier engaged in interstate transportation, and, therefore, includes carriers by motor vehicle and by water not subject to the general provisions of the Interstate Commerce Act. In view of the decisions interpreting the Carmack and Cummins amendments as depriving the states of all power to regulate the rights and duties of parties under bills of lading for interstate transportation, issued by carriers subject to the Interstate Commerce Act, it is practically certain that the states would not have been permitted to have regulated such carriers by legislation substantially similar to that contained in the Bills of Lading Act even if Congress had not enacted this latter legislation. The combined effect of the Carmack and Cummins amendments and the Bills of Lading Act is to deprive the states of all power to regulate the issuance of interstate bills of lading and the responsibilities of carriers thereunder.

The restriction upon state power imposed by this federal legislation does not, however, prevent the states from regulating the procedure in their own courts for the enforcement of the rights created by federal statute. The Court has held that state regulations of procedure are valid if they neither enlarge nor limit the responsibility of the carrier as defined by federal law.[1] It has accordingly sustained, in actions for the enforcement of rights arising under the Carmack amendment, a state law imposing upon the carrier a compensatory allowance for the expense of employing an attorney where the carrier has unreasonably delayed the payment of a just demand,[2] and a state law providing a remedy by

[1] *Missouri, K. & T. Ry.* v. *Harris* (1914), 234 U. S. 412; *St. Louis, B. & M. Ry.* v. *Taylor* (1924), 266 U. S. 200.

[2] *Missouri, Kansas and Texas Ry.* v. *Harris, supra.*

process of attachment enforceable against the traffic balance due to a non-resident defendant carrier from connecting carriers having places of business within the state.[1] In both of these cases the state laws which were enforced were regarded as regulating matters of procedure only and not affecting the substantive rights of the parties as established by federal law.

With respect to the regulation of the liability of carriers for injuries to interstate passengers, the situation is entirely different. The Carmack and Cummins amendments related only to liability for loss, damage or injury to property. Congress, however, has remained silent upon the general subject of the rights of passengers to recover for personal injuries, and the Court has accordingly indicated its opinion that the states are free to establish their own laws and policies with reference to contracts limiting the liability of carriers to passengers.[2] A later decision, however, held that the states have no power to regulate the liability of carriers to persons holding free passes for interstate transportation by enforcing the provisions of a state statute which declared that conditions attached to passes releasing the carrier from liability are invalid.[3] The ground of this decision was that Congress, by forbidding common carriers to issue free passes for interstate passengers, except to specified classes of persons, asserted exclusive jurisdiction over the subject of interstate transportation by pass to the exclusion, not only of state power to regulate what passes may be issued, but also to regulate their limitations, conditions and effect upon the respective rights and responsibilities of the holder of the pass and the carrier. The decision, however, has no bearing upon state regulation of liability for the injury of interstate passengers paying their fare, and there is no reason

[1] *St. Louis, B. & M. Ry.* v. *Taylor, supra.*

[2] See *Chicago, R. I. & P. Ry.* v. *Maucher* (1919), 248 U. S. 359.

[3] *Kansas City Southern Ry.* v. *Van Zant* (1923), 260 U. S. 459.

to suppose that existing legislation would be interpreted as preventing this exercise of state power.

Service and Facilities

The underlying economic cause of the conflict between state and federal powers in the regulation of interstate carriers is the fact that the same facilities must be used for both interstate and intrastate transportation service to avoid unnecessary and extravagant duplication of plant and equipment. This is nowhere more forcefully illustrated than in the field of legislation which embraces the carriers' obligations to render adequate transportation service and to provide the requisite facilities therefor. In the absence of conflicting congressional action, the reserved powers of the states to regulate intrastate commerce necessarily include the power to require carriers to move their intrastate traffic promptly and efficiently and to equip themselves with the tracks, stations, terminals, motive power, rolling stock and other facilities needed for that purpose. Furthermore the reserved powers of the states have been held to include the regulation of services incidental to interstate transportation, particularly in cases where it is impracticable to regulate intrastate service without similarly regulating interstate service. Thus the Court in the absence of conflicting federal regulations has sustained state power to enforce a carrier's common-law obligation to provide switching service to all shippers on its line without discrimination, for both intrastate and interstate traffic,[1] and to impose a statutory liability upon a carrier for failure to furnish a shipper with cars within a reasonable time after freight is offered for transportation, regardless of the destination of the traffic for which the use of cars is required.[2] But Congress, under its

[1] *Missouri Pacific Ry.* v. *Larabee Flour Mills Co.* (1909), 211 U. S. 612.

[2] *Illinois Central R. R.* v. *Mulberry Hill Coal Co.* (1915), 238 U. S. 275.

power to regulate interstate commerce, may also pass laws affecting many of the same services and facilities thus embraced within the reserved powers of the states. A carrier, by virtue of the fact that it is engaged in interstate commerce, is subject to regulation by Congress. When Congress, for the purpose of protecting interstate commerce, prescribes the extent and character of the service that must be rendered and the facilities that must be provided, it considers the needs of the aggregate traffic of the carrier both interstate and intrastate and makes its regulations conform to those needs. Congress could not otherwise perform its function of regulating interstate commerce, because it is impossible as a practical matter to restrict the use of particular tracks, stations, locomotives or cars to interstate traffic. Any state action prescribing different requirements to protect even the intrastate portion of the traffic becomes inconsistent with such exercise of congressional authority. The inescapable consequence is that federal laws regulating service or facilities, even if enacted solely for the purpose of protecting interstate commerce, usually exclude the states from the exercise of some part of their power which they could validly assert while Congress remained silent on the subject.

As far back as 1866, Congress exercised its power to regulate interstate transportation service. In that year it passed an act authorizing every steam railroad to carry passengers and freight in interstate commerce, and to connect with roads of other states so as to form continuous lines for such transportation.[1] This statute standing alone did not seriously restrict the exercise of state power. The only effect attributed to it by the Court was the removal of trammels interposed by state enactments or by existing laws of Congress upon the powers of railroad companies to form

[1] June 15, 1866, 14 Stat. L. 66, Section 5258, U. S. Revised Statutes.

continuous lines of transportation for interstate commerce with connecting roads.[1] By the Interstate Commerce Act, however, Congress has assumed a general control of the service rendered in interstate transportation. The Act makes it the duty of every common carrier subject to its provisions, engaged in transportation of passengers or property, to provide and furnish such transportation upon reasonable request therefor.[2] Transportation is very broadly defined by the Act to include locomotives, cars and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.[3] It imposes a duty upon carriers to establish, observe and enforce just and reasonable regulations and practices with respect to their transportation service which may be necessary or proper to secure the safe and prompt receipt, handling, transportation and delivery of interstate traffic.[4] Any combination, contract or agreement to prevent the carriage of freight from being continuous from the place of shipment to the place of destination is prohibited.[5] The Act gives to the Interstate Commerce Commission the authority to find that any regulation or practice of carriers relating to interstate transportation service is unjust or unreasonable, and to prescribe just and reasonable regulations or practices to be observed by the carriers.[6] It gives to shippers the same remedies that are given to obtain relief from unjust and

[1] See *Dubuque and Sioux City R. R.* v. *Richmond* (1874), 19 Wall. 584, 589; *Davis* v. *Cleveland, C. C. & St. L. Ry.* (1910), 217 U. S. 157, 178.

[2] Section 1 (4).

[3] Section 1 (3).

[4] Section 1 (6).

[5] Section 7.

[6] Section 15 (1).

unreasonable rates; they are entitled to recover the full amount of damages sustained in consequence of any violation of the provisions of the Act,[1] and may proceed by complaint to the Interstate Commerce Commission to obtain an order establishing just and reasonable practices and regulations to be observed by the carriers, and an award of damages occasioned by violation of the Act.[2] Provisions are made for the enforcement of the Commission's orders and awards by court procedure.[3] Heavy penalties are imposed for violation of the provisions of the Act or of the orders of the Commission.[4]

It is apparent from this brief résumé of the general provisions of federal law relating to transportation service that Congress has established a comprehensive plan for the regulation of this subject. It must not, however, be implied that these various provisions of federal law can be construed as preventing the exercise of all the reserved powers of the states to regulate or otherwise affect interstate transportation service. The Court has held that the mere creation of the Interstate Commerce Commission, and the grant to it of a large measure of control over interstate transportation, does not, in the absence of action by the Commission, change the rule that Congress by non-action leaves to the states the power to regulate matters incidental to such transportation.[5] This decision sustained state power to compel a carrier to discharge its common-law duty to furnish non-discriminatory switching service to interstate shippers. In another case, the contention was made that the provisions of federal law requiring railroads to provide continuous interstate transpor-

[1] Section 8.

[2] Sections 13 (1), 15 (1), 16 (1).

[3] Section 16 (2) (12).

[4] Sections 10 (1), 16 (8); Elkins Act (32 Stat. L. 847), Section 1.

[5] *Missouri Pacific Ry.* v. *Larabee Flour Mills Co.* (1909), 211 U. S. 612.

tation over connecting lines [1] are violated by the enforcement of provisions of a state law permitting the attachment of cars owned by an interstate carrier in a suit brought by its creditor.[2] In opposing the attachment, it was argued that it interfered with the federal statutory duty of furnishing continuous interstate transportation. The Court, however, sustained the attachment and stated that the provisions of federal law showed no congressional purpose to relieve railroads from their obligations to their creditors, or to take from the creditors any remedial process provided by the laws of a state. It is apparent from these decisions that the Court has not interpreted federal regulation of interstate transportation service as indicating congressional intention to prevent the exercise by the states of all reserved powers relating to that service. In fact the Act expressly protects state power to regulate or affect interstate transportation service, when its exercise is incidental to the regulation of intrastate service, by a provision that nothing in the Act shall impair or affect the right of a state, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is inconsistent with any lawful order of the Interstate Commerce Commission.[3] It is, therefore, necessary to consider separately various sub-divisions of this general subject of transportation service and to point out the effect of federal legislation as interpreted by the courts upon state power to enforce particular forms of regulation.

In the absence of congressional action, it was customary for the state to impose statutory penalties for failure to render prompt transportation service, and to enforce these

[1] Section 5258, U. S. Revised Statutes, 14 Stat. L. 66; Interstate Commerce Act, Section 7.

[2] *Davis* v. *Cleveland, C. C. & St. L. Ry.* (1910), 217 U. S. 157.

[3] Section 1 (17).

penalties even in cases arising from interstate transportation. Section 6, paragraph (7), of the Interstate Commerce Act prohibits a carrier from engaging in the interstate transportation of passengers or property unless the rates and fares applicable thereto have been filed and published. The Court held that a state statute imposing a penalty for failure to transport freight as soon as received conflicts with the requirements of this section as applied to freight offered for interstate transportation for which rates had not been published and filed as required by the Act.[1] This case, however, involved a direct and obvious conflict between the provisions of federal and state law. In a later decision, the Court went much further and held that the general provisions of the Interstate Commerce Act, imposing a duty to furnish interstate transportation upon reasonable request, deprived the states of power to impose penalties as a means of compelling the performance of this duty.[2] The provisions of the Act upon which particular stress was placed are those which include in the definition of transportation any service in connection with the receipt and delivery of property transported.[3] This decision refused to sustain an Arkansas statute, requiring railroad companies to give notice to consignees of the arrival of freight shipments and imposing a penalty for non-compliance, as applied to interstate shipments. The statute involved in this case was enacted in 1907 after the provisions of the Interstate Commerce Act, with which it was held to conflict, had been inserted by the Hepburn Act of 1906. It clearly establishes the rule that the states, by statutes enacted subsequent to 1906, may not impose penalties for failure to render prompt transportation service. With respect to the enforcement of state statutes

[1] *Southern Ry.* v. *Reid* (1912), 222 U. S. 424.

[2] *St. Louis, I. M. & S. Ry.* v. *Edwards* (1913), 227 U. S. 265.

[3] Section 1 (3).

in existence in 1887, there is, however, an apparent protection of state power in the provisions of Section 22, paragraph (1), enacted in 1887, that nothing in the Act "shall in any way abridge or alter the remedies *now existing* at common law or by statute".[1] As to state statutes passed between 1887 and the enactment of the Hepburn Act of 1906, the situation is distinctly confused because Congress did not definitely establish the federal statutory duty to render prompt transportation service until it passed the Hepburn Act of 1906.[2] There is, therefore, ground for the contention that with respect to penalties for failure to discharge this duty, the provision of the Interstate Commerce Act preserving existing state statutory remedies speaks not as of the date of its enactment, 1887, but as of the date of the Hepburn Act, 1906.

One of the subjects concerning which the concurrent existence of state and federal laws has occasioned much confusion is the regulation of car service. This term is now defined by the Interstate Commerce Act as including "the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment and the supply of trains".[3] The distribution of cars to shippers in times of car shortage is a matter concerning which it is absolutely impossible to unscramble the interests of interstate and intrastate traffic. Each kind of traffic is dependent upon the same car supply for its movement, and, therefore, any laws enforcing a just and equitable distribution of cars must necessarily regulate both interstate and intrastate commerce. Congress in 1920 inserted in the Interstate Commerce Act a series of provisions specifically relating to the duties of carriers with respect to car service

[1] Italics mine.

[2] June 29, 1906, 34 Stat. L. 584.

[3] Section 1 (10).

and conferring authority on the Commission to regulate this subject.[1] But even before these paragraphs were inserted, the general duty of the carriers to furnish transportation upon reasonable request was defined to include car service,[2] and the authority of the Interstate Commerce Commission to prescribe regulations and practices to be observed by the carriers was interpreted by the Court to include authority to regulate the rules for the distribution of cars in times of car shortage.[3] Furthermore, the failure of a carrier to make a just and equitable distribution of this car supply among shippers applying for transportation service is clearly a violation of Section 3, paragraph (1), of the Interstate Commerce Act, prohibiting undue or unreasonable preferences, advantages, prejudices or disadvantages. Full remedies were given by the Act to shippers for the violation of this section, and severe penalties were imposed therefor. Because of these general provisions of federal law, it was held in *Chicago, Rock Island and Pacific Railway* v. *Hardwick Farmers Elevator Company* that a Minnesota statute enacted in 1907, and imposing penalties payable to the shipper for failure to furnish cars for the transportation of freight within a specified time after demand, was invalid as applied to cars intended for interstate shipments.[4] Chief Justice White in the opinion of the Court, after referring to the provisions of the Hepburn Act of 1906 concerning the duty of every carrier to provide interstate transportation service upon reasonable request, says:

The purpose of Congress to specifically impose a duty upon a carrier in respect to the furnishing of cars for interstate

[1] Section 1, paragraphs (10) to (17), inclusive.

[2] Section 1, paragraphs (3) and (4).

[3] *Interstate Commerce Commission* v. *Illinois Central R. R.* (1910), 215 U. S. 452.

[4] (1913), 226 U. S. 426.

traffic is of course by these provisions clearly declared. That Congress was specifically concerning itself with that subject is further shown by a proviso inserted to supplement Section 1 of the original act imposing the duty under certain circumstances to furnish switch connections for interstate traffic, whereby it is specifically declared that the common carrier making such connections "shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper." [1] Not only is there then a specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor, but other applicable sections of the Act to Regulate Commerce give remedies for the violation of that duty . . . [citing Sections 8, 9, 10].

As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the state had a right to exert its authority in the absence of legislation by Congress, it must follow, in consequence of the action of Congress to which we have referred, that the power of the state over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all-embracing authority over the subject.[2]

This case was recently followed by the Court in a decision holding that a state statute imposing triple damages for discrimination in car supply is not enforceable as applied to interstate commerce.[3]

A short time after the *Hardwick* decision, which it will be recalled concerned a statute passed after the Hepburn Act of 1906, a series of decisions was made concerning the power of the states to impose penalties under state statutes enacted prior to 1887 for failure to make a just and equitable dis-

[1] Section 1 (9).

[2] 226 U. S. 426, 434, 435.

[3] *Missouri Pacific R. R.* v. *Stroud* (1925), 267 U. S. 404.

tribution of the car supply.[1] According to these decisions, such penalties continue to be enforceable under the provisions of Section 22, paragraph (1), of the Interstate Commerce Act preserving existing statutory remedies, provided that their enforcement does not require an administrative determination of the justice and equity of the established regulations and practices of the carrier. If the carrier discriminates against a particular shipper by failing to observe its own rules concerning car distribution, then the shipper's right to relief is established without the necessity for any administrative determination, and a state statute penalizing discrimination may be enforced, although the aggrieved shipper wanted the cars for interstate transportation.[2] If, on the other hand, the shipper's grievance lies, not in the failure of the carrier to observe its own rules, but in the alleged unjust and unreasonable character of those rules, then his right to relief depends upon the exercise of administrative discretion to determine what are just and reasonable rules of car distribution to apply under the circumstances. He must then use the machinery provided for his relief by the Interstate Commerce Act by filing a complaint with the Interstate Commerce Commission and obtaining the decision of that body. The Commission, having been charged with the duty of determining the justice and equity of car-distribution rules, must have exclusive jurisdiction over this subject in order to avoid the confusion and conflict that would arise if other tribunals could concurrently reach and enforce different conclusions.[3] When resort to the Interstate Commerce

[1] *Pennsylvania R. R.* v. *Puritan Coal Mining Co.* (1915), 237 U. S. 121; *Illinois Central R. R.* v. *Mulberry Hill Coal Co.* (1915), 238 U. S. 275; *Pennsylvania R. R.* v. *Clark Brothers Coal Mining Co.* (1915), 238 U. S. 456.

[2] *Pennsylvania R. R.* v. *Puritan Coal Mining Co., supra; Illinois Central R. R.* v. *Mulberry Hill Coal Co., supra.*

[3] *Pennsylvania R. R.* v. *Clark Brothers Coal Mining Co., supra.*

Commission is thus necessary to obtain the exercise of its administrative discretion, the entire procedure provided by the Interstate Commerce Act is applicable, including the remedies and penalties for the violation of the provisions of that Act, and no other remedies or penalties provided by state law can be applied.[1]

In addition to common-law and state statutory remedies, the Interstate Commerce Act itself gives to shippers the right to apply directly to the courts for relief without first resorting to the Interstate Commerce Commission. The Act provides that any person claiming to be damaged by a common carrier subject to its provisions may either make complaint to the Commission or bring suit for the recovery of the damages for which the carrier may be liable under the provisions of the Act in any district court of the United States of competent jurisdiction.[2] It further provides that a shipper showing such violation of the provisions of the Act as prevents him from having interstate traffic moved at the same rates as are charged or upon terms or conditions as favorable as those given for like traffic under similar conditions to any other shipper, may obtain in a district court of the United States a writ of mandamus commanding the carrier to move and transport the traffic or to furnish cars or other facilities for transportation for the party applying for the writ.[3] These remedies also are available to shippers only in cases where no exercise of administrative discretion within the jurisdiction of the Commission is necessary to establish the shipper's right to relief. Since the determination of the justice and equity of car-distribution rules is subject to the administrative discretion of the Commission, the Court decided that a shipper may not apply for a writ of

[1] *Pennsylvania R. R.* v. *Clark Brothers Coal Mining Co., supra.*

[2] Section 9.

[3] Section 23.

mandamus under the provisions of the Interstate Commerce Act to compel a railroad company to change its rules for the distribution of coal cars on the ground that the existing rules are unjustly discriminatory.[1]

Mr. Justice White in the opinion of the Court said:

> When the situation is thus defined we see no escape from the conclusion that the grievances complained of were primarily within the administrative competency of the Interstate Commerce Commission, and not subject to be judicially enforced, at least until that body, clothed by the statute with authority on the subject, had been afforded by a complaint made to it, the opportunity to exert its administrative functions. . . .
>
> The remedy by mandamus in the cases which it embraces, must be limited either to the performance of duties which are so plain and so independent of previous administrative action of the Commission as not to require a prerequisite exertion of power by that body, or to compelling the performance of duties which plainly arise from the obligatory force which the statute attaches to orders of the Commission.[2]

The same principle would prevent a shipper from applying directly to the courts for damages under Section 9 of the Interstate Commerce Act without first resorting to the Commission in cases where his claim for damages is based upon an allegation that the regulations or practices of car distribution enforced against him are unreasonably discriminatory.

It is thus clear that, even before the amendments of 1920, the Interstate Commerce Act had regulated the subject of car distribution in such a way as to deprive the states of a large measure of their reserved powers concerning this subject. The decisions to which reference has been made show that the Court interpreted the general provisions of the Act relating to interstate transportation service as applying to

[1] *Baltimore and Ohio R. R.* v. *Pitcairn Coal Co.* (1910), 215 U. S. 481.

[2] 215 U. S. at 493, 499.

the regulation and the distribution of the available car supply. The Act as now amended contains a series of provisions specifically relating to car service. In addition to a very broad definition of the term "car service", which covers practically the entire freight operations of interstate railroads,[1] the Act requires every railroad subject to its provisions to furnish safe and adequate car service, and to establish, observe and enforce just and reasonable rules, regulations and practices with respect to car service.[2] It defines in even greater detail the obligation of railroads concerning the distribution of cars for the transportation of coal in times of car shortage.[3] The Commission is authorized to establish rules, regulations and practices with respect to car service,[4] and in times of emergency to suspend the existing rules and to make such directions as in its opinion will best promote the service in the interest of the public and the commerce of the people.[5] Compliance by the railroads with such orders or directions of the Commission is required, and heavy penalties are imposed for their violation.[6] These various specific provisions of the Interstate Commerce Act concerning car service do not materially add to restrictions upon state power which existed as a result of the Court's interpretation of the general provisions of the Act.

In connection with the regulation of car distribution, special attention should be given to the provisions that nothing in the Act shall impair or affect the right of a state, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business,

[1] Section 1 (10).

[2] Section 1 (11).

[3] Section 1 (12).

[4] Section 1 (14).

[5] Section 1 (15).

[6] Section 1 (17).

except in so far as such requirement is inconsistent with any lawful order of the Commission.[1] Therefore, if no federal order regulating car distribution is in force in a given territory, the state, in order to protect intrastate traffic, may make its own order prescribing rules for the distribution of the entire available car supply, and may enforce its order by imposing penalties for failure to give intrastate shippers the quota of cars to which they are entitled under the state established rules. Although the state in such a case is denied the power to impose the penalties for failure to furnish the prescribed quota of cars for interstate shipments,[2] it may nevertheless regulate the car supply available for interstate transportation by strict enforcement of the railroad's obligation to protect the traffic destined to points within the state. If, in such a situation, a railroad should discriminate against a shipper applying for cars for interstate shipments, the state is powerless to protect him, but he may resort to the Interstate Commerce Commission for the protection of his rights under the provisions of the federal law.[3]

The present situation with respect to car distribution may now be summarized. Whenever the Interstate Commerce Commission makes an order regulating the distribution of cars, the terms of that order prevail with respect to car supply for both interstate and intrastate traffic. The states are without power to regulate the distribution of the particular kind of cars in the particular territory covered by the Commission's order. But if the situation is not controlled by an order of the Commission, the states may prescribe the rule of distribution for all kinds of traffic. They may, however, enforce their order by appropriate penalties only in cases where its violation adversely affects intrastate shippers.

[1] Section 1 (17).

[2] *Missouri Pacific R. R.* v. *Stroud* (1925), 267 U. S. 404.

[3] Interstate Commerce Act, Sections 8, 9, 13 (1), 15 (1), 16 (1).

So far as interstate shippers are concerned, their only remedy is by complaint to the Interstate Commerce Commission or by suit in the federal courts, except in those comparatively rare cases where a state statute enacted prior to the creation of the federal remedies can be enforced for violation of the established rules of the carrier.

The Transportation Act of 1920 has inserted in Section 1 of the Interstate Commerce Act five paragraphs which give to the Interstate Commerce Commission broad and comprehensive powers to prescribe the facilities for transportation which shall be furnished and operated by railroads engaged in interstate commerce.[1] As so amended, the Act now requires that no railroad subject to it shall extend its line, or acquire or operate any line of railroad or extension thereof, without obtaining from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require the construction or operation of the additional or extended line, and that no such railroad shall abandon the operation of all or any portion of its line without a certificate from the Commission that the present or future public convenience and necessity permit of such abandonment.[2] The Commission is given power to attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require, and the railroad may, *without securing approval other than such certificate,* comply with its terms and conditions and proceed with the construction, operation or abandonment covered thereby.[3] The Commission may authorize or require by order any carrier by railroad subject to the Act to provide itself with safe and adequate facilities for performing its car service and to extend its line.[4] Severe penalties

[1] Section 1 (18) to (22), inclusive.

[2] Section 1 (18).

[3] Section 1 (20).

[4] Section 1 (21).

are imposed for unauthorized construction, operation or abandonment and for violations of the Commission's orders requiring facilities or extensions.[1] The Act, however, provides that the authority of the Commission conferred by these paragraphs shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks located wholly within one state, or of street, suburban or interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation.[2]

As a result of this legislation the states now cannot exercise their power to authorize or require steam railroads engaged in interstate commerce to extend their lines or construct branches even for the purpose of providing wholly intrastate transportation service by extensions wholly within one state. An interstate railroad, undertaking such extension or construction in sole reliance upon state authorization or requirements and without first obtaining a certificate of convenience and necessity from the Interstate Commerce Commission, would be immediately faced with an injunction prohibiting the project on the ground that it would be a violation of the Interstate Commerce Act.[3] If, on the other hand, a state should require the continued operation of a part of an interstate railroad for the abandonment of which the Interstate Commerce Commission's certificate of convenience and necessity had been obtained, the railroad would be fully protected from the enforcement of the state requirement by the provision that it may comply with the terms and conditions of the federal certificate without securing other approval.[4] The economic reason for thus preventing the exer-

[1] Section 1 (20) (21).

[2] Section 1 (22).

[3] *Texas and Pacific Ry.* v. *Gulf, C. & S. F. Ry.* (1926), 270 U. S. 266; *Alabama and Vicksburg Ry.* v. *Jackson and Eastern Ry.* (1926), 271 U. S. 244.

[4] *Colorado* v. *United States* (1926), 271 U. S. 153.

cise of an important part of the states' reserved powers to protect their own internal commerce is found in the financial connection between the intrastate operations of railroads and their ability to furnish adequate interstate transportation, and has already been discussed in deail in connection with the decisions sustaining the power of Congress to enact such legislation.[1] But the economic argument ceases to apply when a railroad located wholly within one state has been authorized to abandon its entire interstate business. Mr. Justice Van Devanter said of such a road:

> Its continued operation solely in intrastate commerce can not be of more than local concern. Interstate and foreign commerce will not be burdened or affected by any shortage in the earnings, nor will any carrier in such commerce have to bear or make good the shortage. It is not as if the road were a branch or extension whose unremunerative operation would or might burden or cripple the main line, and thereby affect its utility or service as an artery of interstate and foreign commerce.[2]

It was, therefore, held that a state may require it to continue its intrastate service without conflicting with the provisions of the Interstate Commerce Act.[3] The state, however, is restrained by the due process clause of the Fourteenth Amendment from compelling the road to handle intrastate traffic at an actual loss unless it is under a contractual obligation to continue its operations.[4]

The requirement of a certificate of convenience and necessity is held to apply to the construction or abandonment of connections between steam railroads engaged in interstate

[1] See pp. 239-243, *supra*.

[2] *Texas* v. *Eastern Texas R. R.* (1922), 258 U. S. 204, 216.

[3] *Ibid.*

[4] *Railroad Commission of Texas* v. *Eastern Texas R. R.* (1924), 264 U. S. 79.

commerce, so that it is beyond state authority to require the construction of such connections or their continued operation.[1]

This radical restriction of state power is now the cause of much complaint. Both shippers and state authorities feel that the reasonable requirements of intrastate traffic cannot be fully met so long as it is necessary to rely upon the Interstate Commerce Commission for the regulation of construction or abandonment. The procedure now required, not only involves considerable delay in obtaining the final order of the Commission, pending which much needed construction cannot be commenced, but also places the final determination of what the public necessity and convenience requires in the hands of a body which cannot be as familiar with local conditions and requirements as the state authorities.

The new paragraphs concerning construction and abandonment also affect state power to regulate the construction and operation of station and terminal facilities. A state cannot require steam railroads engaged in interstate commerce to undertake the construction of a station or terminal project if it involves the construction or abandonment of portions of their main line, or if the project is so costly as to require the issuance of capital securities to obtain the necessary funds for its execution.[2] The reasons why state power cannot be exercised under these circumstances are found in the requirements of a certificate of convenience and necessity for the construction or abandonment of any part of the main line of such railroads and the provision prohibiting them from issuing securities without the approval of the Commission.[3] It also seems quite clear that a state cannot require an inter-

[1] *Alabama and Vicksburg Ry.* v. *Jackson and Eastern Ry.* (1926), 271 U. S. 244.

[2] *Railroad Commission of California* v. *Southern Pacific Co.* (1924), 264 U. S. 331.

[3] Section 20a (2).

state railroad to construct station or terminal facilities for common use with other railroads. Congress has asserted very complete jurisdiction over this subject by the provisions of the Interstate Commerce Act requiring interstate railroads to provide reasonable facilities for operating through routes,[1] to afford reasonable, proper and equal facilities for the interchange of traffic between their respective lines,[2] and authorizing the Commission to require the use of the terminal facilities of any carrier by other carriers in an emergency,[3] or when it does not impair the carrier's power to handle its own business with its terminal facilities.[4] Concerning these provisions Chief Justice Taft said:

It is obvious from the foregoing that Congress intended to place under the superintending and fostering direction of the Interstate Commerce Commission all increased facilities in the matter of distribution of cars and equipment and in joint terminals, in the exchange of interstate traffic and passengers between railways so as to make it prompt and continuous. It not only provides for the temporary expropriation of terminals and main track of one railway to the common use of one or more other railways in an emergency, but it also comtemplates the compulsory sharing of one company's terminals with one or more companies as a permanent arrangement. This is a drastic limitation of a carrier's control and use of its own property in order to secure convenience and dispatch for the whole shipping and travelling public in interstate commerce. It gives to the Interstate Commerce Commission the power and duty, where public interest requires, to make out of what is the passenger and freight station of one interstate carrier, a union station or depot.[5]

[1] Section 1 (4).

[2] Section 3 (3).

[3] Section 1 (15).

[4] Section 3 (4).

[5] *Railroad Commission of California* v. *Southern Pacific Co.* (1924), 264 U. S. 331, 343.

Since the determination of the extent to which a carrier's terminal facilities shall be used by other carriers is clearly a matter of administrative discretion, and since the exercise of this discretion is vested by the Interstate Commerce Act in the Interstate Commerce Commission, the exercise of similar powers by state authorities would seem to be precluded by the various decisions to the effect that the Interstate Commerce Commission has exclusive jurisdiction over matters of administrative discretion entrusted to its care. This jurisdiction would be invaded by state laws or orders requiring one carrier to construct terminal facilities for the use of another.

There is, however, nothing in the Interstate Commerce Act which prevents the exercise of state power to require an interstate railroad to furnish adequate station and terminal facilities for handling its own intrastate traffic where this can be done without changing the location of its main line or without the issuance of new securities to obtain the necessary funds. It is true that the Interstate Commerce Act gives to the Commission the general authority to require a railroad to furnish safe and adequate facilities for performing its car service.[1] But the Act expressly provides that this general authority shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one state.[2] It has therefore been held that a state has power to authorize and require an interstate railroad to provide such facilities even for the purpose of performing switching service for interstate traffic.[3] This decision was reached with respect to an industrial siding notwithstanding the fact that another pro-

[1] Section 1 (21).

[2] Section 1 (22).

[3] *Western and Atlantic R. R.* v. *Georgia Public Service Commission* (1925), 267 U. S. 493; see also *Texas and Pacific Ry.* v. *Gulf, C. & S. F. Ry.* (1926), 270 U. S. 266, 278.

vision of the Act,[1] which empowers the Interstate Commerce Commission to require a railroad to construct and operate a switch connection with any private side track, has never been expressly repealed.[2] The Supreme Court has indicated that state authority to require the construction of adequate station and terminal facilities for intrastate traffic includes the power to compel carriers to unite in the construction of a union station at an existing intersection of their lines where the project does not involve the issue of securities.[3]

What has just been said relates to the power of the states to require interstate railroads to provide station and terminal facilities or to prohibit their abandonment. With respect to the operation of existing facilities, the Interstate Commerce Commission clearly has authority to regulate their use under the general provisions of the Interstate Commerce Act establishing the duty of carriers to furnish interstate transportation upon reasonable request therefor and entrusting the Commission with the enforcement of this duty. This is made clear by the Act's definition of the terms "railroad" and "transportation" which include respectively "all switches, spurs, tracks, terminals and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property", and "all in-

[1] Section 1 (9).

[2] *Western and Atlantic R. R.* v. *Georgia Public Service Commission, supra.* Section 1 (22) provides that the authority of the Commission conferred by Section 1, paragraphs (18) to (21) inclusive, shall not extend to the construction or abandonment of industrial tracks wholly within one state. This proviso, therefore, by its terms does not affect the special power of the Commission to require the construction and operation of a switch connection with a private side track conferred by Section 1 (9).

[3] See *Railroad Commission of California* v. *Southern Pacific Co., supra.*

struments and facilities of shipment or carriage . . . and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported ".[1] The states are, of course, subordinate to the exercise of this authority by the Interstate Commerce Commission, and no state regulation or order regulating the use of stations and terminals for intrastate traffic would be valid if in conflict with orders of the Commission regulating their use for interstate traffic. State power to establish and enforce regulations not in conflict with federal orders seems, however, to be fully protected by the provision of the Act that nothing therein shall impair or affect the right of a state in the exercise of its police power to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is inconsistent with any lawful order of the Commission.[2]

The power of the states to require interstate railroads to equip themselves with additional motive power or rolling stock for handling their intrastate traffic is now restricted by two provisions of the Interstate Commerce Act. One of these authorizes the Interstate Commerce Commission to require by order any interstate steam railroad to provide itself with safe and adequate facilities for performing its car service.[3] The other is the provision prohibiting the issue of securities without the authority of the Commission.[4] Under the authority of the former provision, the Interstate Commerce Commission may prescribe the quantity of motive power and rolling stock which an interstate railroad must provide for all its traffic both interstate and intrastate. It is quite probable that the Court would hold that the discretion-

[1] Section 1 (3).

[2] Section 1 (17).

[3] Section 1 (21).

[4] Section 20a (2).

ary authority thus vested in the Commission is inconsistent with the exercise of similar authority by the states even if the Commission has not acted under it. It is entirely clear that when the Commission has acted, the states are without power to make orders on this same subject and that in any event state orders for the installation of additional equipment must not impose such a financial burden on the railroads as to require the issue of securities which can be authorized only by the Interstate Commerce Commission.

The states formerly had the power to authorize or prohibit the construction of bridges over navigable streams.[1] This power no longer exists, as Congress by acts passed in 1890 and 1899[2] has assumed jurisdiction over the entire subject of obstructions to navigation, and has committed to the Secretary of War the power to determine when such obstructions may be erected. Therefore, a new railroad bridge over a navigable stream must be approved by the Secretary of War, and the authority of a state legislature is not sufficient.[3]

It is thus apparent that the exercise of the reserved powers of the states to regulate the facilities furnished by interstate railroads is severely restricted by federal legislation. They can no longer be exercised with respect to the construction and continued operation of the main line and branches of steam railroads engaged in interstate commerce. Even with respect to other facilities, state power as a practical matter is crippled by the requirement that the issue of securities, so often necessary when new facilities are installed, must be approved by the Interstate Commerce Commission. Further restriction is placed upon state powers by the comprehensive

[1] *Gilman* v. *Philadelphia* (1866), 3 Wall. 713. See pp. 67, 90, *supra*.

[2] 26 Stat. L. 426, 453; 30 Stat. L. 1121, 1151.

[3] *Southern Pacific Co.* v. *Olympian Dredging Co.* (1922), 260 U. S. 205, 208.

jurisdiction vested in the Interstate Commerce Commission to control the joint use of terminals and the facilities for interline transportation. About all that the states may now do is to regulate the construction and continued operation of inexpensive switching, station and terminal facilities and the use of existing facilities for intrastate traffic in ways not in conflict with federal orders regulating their use for interstate traffic.

Safety

In the absence of conflicting federal laws, the reserved power of the states to regulate interstate railroads for the protection of the safety of passengers and employees is very comprehensive. In no other field of regulation is less restraint placed upon state authority by the judicial interpretation of the Constitution. So long as Congress remained silent, state regulations not exceeding the reasonable requirements of public safety were usually sustained regardless of their effect upon interstate commerce. But this important reserved power of the states is now materially restricted by various federal laws enacted under the commerce power to promote safety on interstate railroads. Among these are the Safety Appliance Acts, the Ash Pan Act, the Boiler Inspection Act, the section of the Interstate Commerce Act concerning the installation of train-stop or control devices, the Hours of Service Act, and the Transportation of Explosives Act.

The Safety Appliance Acts as amended[1] require the use of specified safety devices on the locomotives and cars of railroads engaged in interstate commerce. Their provisions apply to all locomotives and cars owned by such railroads regardless of whether they are actually used for the movement of interstate traffic. The devices required by the Act

[1] Act of March 2, 1893, 27 Stat. L. 531; Act of March 2, 1903, 32 Stat. L. 943; Act of April 14, 1910, 36 Stat. L. 298.

are power driving-wheel brakes on locomotives, appliances for controlling the trains by power brakes without requiring brakemen to use the common hand brake, automatic couplers, secure grab-irons and hand-holds in the ends and sides of each car and at the top of ladders, draw bars of standard height, secure sill-steps and efficient hand-brakes on all cars, and secure ladders and running boards on cars requiring their use. A percentage of the cars in every train, determined by the Interstate Commerce Commission, must have their brakes used and operated by the engineer. The Interstate Commerce Commission is authorized to regulate the details of the application of sill-steps, hand-brakes, ladders, running-boards and grab-irons, and to prescribe the standard height of draw bars. Penalties are imposed for violations of the Act or of the orders of the Commission issued in pursuance of its authority.

As interpreted by the Court, these Acts have entirely supplanted state authority to regulate the equipment of the freight cars of interstate railroads with safety appliances. Mr. Justice Lamar in an opinion of the court said:

> The exclusive effect of the Safety Appliance Act did not relate merely to details of the statute and the penalities it imposed, but extended to the whole subject of equipping cars with appliances intended for the protection of employees. The states thereafter could not legislate so as to require greater or less or different equipment; nor could they punish by imposing greater or less or different penalties. . . .
>
> Congress has so far occupied the field of legislation relating to the equipment of freight cars with safety appliances as to supersede existing and prevent further legislation on that subject.[1]

It was accordingly held that an Indiana statute, requiring

[1] *Southern Ry.* v. *Railroad Commission of Indiana* (1915), 236 U. S. 439, 446, 447.

railroad companies to place secure grab irons or hand holds on every railroad car under penalty of $100 fine for every violation, was unenforceable against an interstate railroad even with respect to a car moving in intrastate commerce.[1] A Pennsylvania law, requiring the rear platform of trains to be thirty inches wide with guard rails and steps, was also held invalid as in conflict with the Safety Appliance Acts and the regulations of the Interstate Commerce Commission thereunder permitting the employment of caboose cars without platforms.[2]

In addition to the requirements of the Safety Appliance Acts, Congress has regulated the equipment of locomotives by the Ash Pan Act,[3] and the Boiler Inspection Act.[4] The Ash Pan Act by its terms applies only to locomotives used in interstate transportation and requires the use of an ash pan which can be dumped or emptied and cleaned without the necessity of any employee going under the locomotive. The Boiler Inspection Act as amended applies to all the locomotives of interstate railroads, except street, suburban and interurban electric railways not operated as a part of a general railroad system of transportation. Its principal requirement is that every locomotive, its boiler, tender and all parts and appurtenances thereof, shall be in proper condition and safe to operate. Elaborate administrative provisions are made for the enforcement of this requirement, which include the inspection of all locomotives in accordance with rules of inspection subject to the control of the Interstate Commerce Commission. This control of the inspection rules

[1] *Southern Ry.* v. *Railroad Commission of Indiana, supra.*

[2] *Pennsylvania R. R.* v. *Public Service Commission of Pennsylvania* (1919), 250 U. S. 566.

[3] May 30, 1908, 35 Stat. L. 476.

[4] February 17, 1911, 36 Stat. L. 913, amended by Acts of March 4, 1915, 38 Stat. L. 1192 and June 7, 1924, 43 Stat. L. 659.

gives the Commission power to prescribe the tests which must be met on inspection, and thus to regulate the standards of equipment for all parts of locomotives and tenders. The Act also contains the usual provisions imposing penalties for violations of the Act or any rule or regulation made under its provisions.

Prior to an amendment of 1915, the Act applied only to locomotive boilers and their appurtenances. In that form it was not considered by the Court to be an exercise of congressional authority over the entire subject of the equipment of locomotives, and state statutes prescribing the standard candle-power of locomotive headlights were sustained.[1] These decisions are also noteworthy because the cases arose after the enactment of the Safety Appliance Acts, and, therefore, show that the Court did not construe them as destroying all state power to regulate the safety devices of locomotives, although it had decided at approximately the same time that the Safety Appliance Acts completely supplanted state power to regulate safety devices on freight cars.[2] The 1915 amendment to the Boiler Inspection Act, however, extended its provisions to all parts of the locomotive and tender, and now the reserved power of the states to regulate the standards of equipment of the steam locomotives and cars of interstate railroads has been completely suspended.[3]

Section 26 of the Interstate Commerce Act, which was inserted in 1920, confers upon the Interstate Commerce Commission the power to order any interstate railroad to install automatic stop or train control devices or other safety devices, which comply with specifications and requirements pre-

[1] *Atlantic Coast Line R. R.* v. *Georgia* (1914), 234 U. S. 280; *Vandalia R. R.* v. *Public Service Commission of Indiana* (1916), 242 U. S. 255.

[2] See *Southern Ry.* v. *Railroad Commission of Indiana* (1915), 236 U. S. 439.

[3] See *Napier* v. *Atlantic Coast Line* (1926), 272 U. S. 605.

scribed by the Commission, upon the whole or any part of its railroad. This power is now being extensively exercised by the Commission, and most of the important interstate railroads have already installed or are now installing automatic train control devices on parts of their lines in accordance with the Commission's orders. The administrative discretion given to the Commission by this section would undoubtedly be interpreted by the Court to preclude the power of the states to require such railroads to install similar devices.

The federal Hours of Service Act,[1] applies to all railroad employees engaged in interstate transportation and actually engaged in or connected with the movement of any train. This, of course, includes not only train crews, but also train dispatchers, telegraph operators handling train orders, signal operators and switchmen. The Act fixes the maximum hours of continuous service of such employees and the number of hours that they shall be off duty. This Act has been construed by the courts to prevent state legislation regulating the hours of service of employees engaged in the movement of interstate trains even when the legislation does not conflict with the actual provisions of the federal act.[2] Thus the Court held that state statutes regulating the hours of service of such employees were not enforceable between the enactment of the federal law and the date when it became effective, the Court attributing to Congress an intention that the subject should be unregulated during the intervening period,[3] and that a state may not prescribe for such employees even shorter hours of service than those prescribed by the federal law.[4]

[1] March 4, 1907, 34 Stat. L. 1415.

[2] *Northern Pacific Ry.* v. *Washington* (1912), 222 U. S. 370; *Erie R. R.* v. *New York* (1914), 233 U. S. 671.

[3] *Ibid.*

[4] *Erie R. R.* v. *New York, supra.*

Sections 232 to 236, inclusive, of the Penal Laws of the United States as amended March 4, 1921,[1] contain detailed regulations of the transportation of explosives and similar commodities. The regulations apply to the transportation of these commodities by any common carrier engaged in interstate or foreign commerce and, therefore, affect street railways, carriers by motor vehicle, and all water carriers as well as the classes of carriers subject to the provisions of the Interstate Commerce Act. They prohibit the transportation of high explosives on any passenger vehicle of an interstate carrier subject to certain exceptions and provisos. The Interstate Commerce Commission is authorized to make regulations for the safe transportation of explosives applying to all shipments via any interstate carrier. The transportation of liquid nitro-glycerine and other like explosives by an interstate carrier is prohibited. Provisions are made for the marking of packages containing explosives or other dangerous articles, and penalties are imposed for the violation of these various provisions or of regulations by the Interstate Commerce Commission on the subject. The regulations apply to all shipments of explosives by interstate carriers, including those moving wholly within one state. These sections of the penal law are clearly such a complete exercise of congressional authority over the entire subject of the transportation of explosives and dangerous articles by interstate carriers that the states may no longer exercise power to enforce safety regulations on this subject applicable to such carriers.

Liability for Injuries or Death of Employees

The regulation of liability for injuries to or the death of employees is really a part of the general subject of the regulation of safety. The avowed purpose of federal or state

[1] 41 Stat. L. 1444.

statutes enlarging the liability of railroads is to promote the safety of the employees. There is no more powerful sanction to compel employers to protect the safety of their employees than a severe rule of liability for their injury or death. Congress has regulated, both expressly and by implication, the liability of railroads for injuries or death resulting from the use of equipment in violation of the Safety Appliance Acts and similar statutes. It has also regulated the railroads' liability for injury to or death of employees engaged in interstate commerce. These two forms of regulation clearly overlap in cases where defects of safety appliances result in injury to or death of interstate employees. Such a situation is fully covered by the Federal Employers' Liability Act and will be discussed in connection with that Act.

The Supreme Court has decided that the Safety Appliance Acts, and other similar acts of Congress, imposing obligations on railroads to equip their locomotives and cars in the manner thereby prescribed, create by implication a civil liability for injury or death resulting from a violation of these acts.[1] Mr. Justice Clarke, in an opinion of the Court, said:

> By this legislation the qualified duty of the common law is expanded into an absolute duty with respect to car couplers, and if the defendant railroad companies used cars which did not comply with the standard thus prescribed, they violated the plain prohibition of the law, and there arose from that violation a liability to make compensation to any employee who was injured because of it.[2]

An express regulation of liability for violation of the Safety Appliance Acts is found in Section 8 of the Act of 1893,[3]

[1] *Texas and Pacific Ry.* v. *Rigsby* (1916), 241 U. S. 33; *Louisville and Nashville R. R.* v. *Layton* (1917), 243 U. S. 617.

[2] *Louisville and Nashville R. R.* v. *Layton, supra,* at p. 620.

[3] 27 Stat. L. 531, 532.

which provides that any employee of an interstate carrier injured by any locomotive, car or train in use contrary to the provisions of the Act shall not be deemed to have assumed the risk thereby occasioned, although continuing in employment after the unlawful use of such locomotive, car or train had been brought to his knowledge. This section expressly revokes the old common-law defense of assumption of risk formerly available in actions based on injuries resulting from defective equipment. Congress, by the Safety Appliance Act as thus construed, has, therefore, established the liability of railroads to their employees for injuries resulting from the use of illegal equipment, and has abolished the defense of assumption of risk in any action to recover damages therefor. The liability thus established enures to the benefit, not only of the particular class of employees for whose protection a safety device is required, but of any employee injured by reason of the defect. The requirement of automatic couplers was made primarily to obviate the necessity of employees going between cars in coupling operations. In a case where the plaintiff was thrown from the roof of a car by the impact of a collision, which would not have occurred if every car had been properly equipped with automatic couplers, he was permitted to recover the damages sustained by this accident under the federal Safety Appliance Act, although he was not engaged in coupling when injured.[1] It has also been held that neither the injured employee nor the defective equipment resulting in his injury need be engaged in or used in interstate commerce at the time of the injury.[2] From these decisions it is clear that Congress has comprehensively regulated the subject of liability of interstate railroads to all employees where the injury results from the use of illegal equipment. The effect of this exercise of federal

[1] *Louisville and Nashville R. R.* v. *Layton, supra.*

[2] *Texas and Pacific Ry.* v. *Rigsby, supra.*

power upon the reserved powers of the states is thus defined by the Court's opinion by Mr. Justice Pitney in the case last cited:

Without the express leave of Congress, it is not possible, while the federal legislation stands, for the states to make or enforce inconsistent laws giving redress for injuries to workmen or travellers occasioned by the absence or insecurity of such safety devices, any more than laws prescribing the character of the appliances that shall be maintained, or imposing penalties for failure to maintain them; for the consequences that follow a breach of law are vital and integral to its effect as a regulation of conduct, liability to a private suit is or may be as potent a deterrent as liability to public prosecution, and in this respect there is no distinction dependent upon whether the suitor was injured while employed or travelling in one kind of commerce [interstate] rather than the other [intrastate].[1]

The federal regulation of employers' liability resulting from violation of the laws requiring the use of safety devices was not, however, considered to occupy the entire field of regulation of employer's liability to the exclusion of all state power. Prior to the enactment of the federal Employers' Liability Act, the states could enforce statutes enlarging the right of employees to recover for injuries resulting from causes other than the defect of safety appliances even when the injured employees were engaged in interstate commerce at the time of injury. This is shown by a decision sustaining the right of an employee engaged in interstate commerce to recover damages under a state statute for injuries resulting from the negligence of other employees, which occurred prior to the enactment of the federal Employers' Liability Act.[2]

By the Employers' Liability Act Congress assumed complete and exclusive jurisdiction of the regulation of the civil

[1] 241 U. S. at 41.

[2] *Missouri Pacific Ry.* v. *Castle* (1912), 224 U. S. 541.

liability of railroads for damages caused by the injury or death of employees engaged in interstate commerce.[1] This legislation abolished the defense afforded by the common-law fellow-servant rule whereby an employer was not liable in damages for the injury or death of an employee resulting from the negligence of a fellow employee. It modified the common-law defense of contributory negligence by providing that this defense should not be a complete bar to recovery, but should merely diminish the amount of damages in proportion to the amount of negligence attributable to the injured employee; in cases where a violation by the railroad of any statute enacted for the safety of employees contributed to the injury or death, the defense of contributory negligence was entirely abolished. The legislation also abolished the common-law defense of assumption of risk by the employee in cases arising from the violation of safety statutes; with respect to violations of the federal Safety Appliance Acts this merely confirmed the express provisions of those Acts. The Employers' Liability Act as amended also gives a right of action to the widow, children, parents or dependent next of kin of such an employee for damages resulting from his death, and provides for the survival of the employee's right of action in case he dies subsequent to his injury, thus abolishing the common-law rule that his right of action dies with him.

In sustaining the power of Congress to enact this law, the Court held that its provisions were applicable to the injury or death of employees engaged in interstate commerce even when resulting from the negligence of an employee not engaged in interstate commerce.[2] The laws of the state, in so far as they cover the same field, are superseded.[3] This field

[1] Act of April 22, 1908, 35 Stat. L. 65, amended by Act of April 5, 1910, 36 Stat. L. 291.

[2] *Second Employers' Liability Cases* (1912), 223 U. S. 1.

[3] *Ibid.*

includes the entire subject of the liability of railroad companies to their employees injured or killed while engaged in interstate commerce, excepting matters of procedure which do not affect the substantive right to recover damages.[1] Prior to an amendment of 1910, the federal law did not provide for the survival of the right of action of an injured employee after his death. The matter of survival was held to affect the substantive right to recover damages and not to be merely a matter of procedure; therefore, the common-law rule that the right of action of the injured employee died with him was held to apply prior to the 1910 amendment, notwithstanding the fact that state statutes provided for the survival of the right of action.[2] Although Congress has established a right of action only for injury or death due to negligence or the violation of safety acts, it was held that the states are deprived of power to enforce workmen's compensation laws for the benefit of interstate employees even in cases where the injury or death is purely accidental and not attributable to those causes covered by the federal Act.[3] This position of the Court met with very vigorous dissent by Mr. Justice Brandeis on the ground that Congress did not intend to enter the field of regulating all liability for injuries arising without fault on the railroads' part. He makes a very interesting argument based on the totally different philosophy and purpose of the Employers' Liability Act and of workmen's compensation laws, the former being merely intended to do justice under the old individualistic system and the latter

[1] *Michigan Central R. R.* v. *Vreeland* (1913), 227 U. S. 59, 66; *North Carolina R. R.* v. *Zachary* (1914), 232 U. S. 248; *Seaboard Air Line Ry.* v. *Horton* (1914), 233 U. S. 492; *Chicago, R. I. & P. Ry.* v. *Wright* (1916), 239 U. S. 548.

[2] *Michigan Central R. R.* v. *Vreeland, supra.*

[3] *New York Central R. R.* v. *Winfield* (1917), 244 U. S. 147; *Erie R. R.* v. *Winfield* (1917), 244 U. S. 170; *New York Central R. R.* v. *Porter* (1919), 249 U. S. 168.

being intended to promote a departure from the individualistic basis of right and liability and to impose the burden of industrial accidents arising through nobody's fault on the industry.[1] The position of the majority, however, seems to be more consistent with the avowed purpose of the Court to prevent conflict between state and federal rules of liability. The state workmen's compensation laws are usually applicable to the injury or death of employees regardless of the cause, and would appear clearly to be inconsistent with the federal legislation if applied to injuries resulting from negligence or violation of safety laws. As an administrative matter, it is very difficult for the states to separate the two classes of injuries and to entertain applications for relief for purely accidental injuries while rejecting those based upon the fault of the railroad or its employees. It would be very unfortunate for the injured employee if a railroad should successfully contest the award of a state compensation commission on the ground that the injuries resulted from negligence, and if this contest should not be finally determined until after the employee's right to recover under the Employers' Liability Act had been barred by its provisions requiring suit to be brought within two years. The injustice of imposing the burden of purely accidental injuries upon the injured employee and his family can be satisfactorily removed only by a federal law similar to the state workmen's compensation laws.

The federal Employers' Liability Act does not deprive the state courts of jurisdiction to entertain suits for the recovery of damages arising from the injury or death of interstate employees, but the substantive rule of liability must be that imposed by federal law or by the common law as interpreted by the federal courts.[2] Rules as to the burden of proof in

[1] *New York Central R. R.* v. *Winfield, supra.*

[2] *Second Employers' Liability Cases* (1912), 223 U. S. 1; *Central Vermont Ry.* v. *White* (1915), 238 U. S. 507.

such action are held by the Court to be a matter of substantive rights and not of mere procedure. Therefore, state statutory rules concerning the burden of proof, or state common-law rules differing from the common law as interpreted by the federal courts, cannot be applied in such actions. Thus it was held that a plaintiff could recover full damages in an action in a state court under the federal Employer's Liability Act without affirmatively proving his freedom from contributory negligence, notwithstanding the fact that the local rule of the state assumed contributory negligence in the absence of affirmative proof to the contrary.[1] In other cases the Court refused to apply a Mississippi statute providing that negligence shall be assumed where the injury is inflicted by an engine propelled by steam unless the defendant railroad affirmatively proves the absence of negligence, and reversed judgment for the plaintiff obtained without proof of the defendant's negligence.[2]

The net result of these federal laws is to prevent the exercise of state power to regulate the liability of interstate railroads for the injury or death of their employees if caused by violations of federal laws enacted to promote their safety or if the employees were engaged in interstate commerce at the time of the accident resulting in their injury or death. So far as the substantive right to recover damages is concerned, state power remains only with respect to employees not engaged in interstate commerce when injured or killed, and whose injury or death is not caused by violation of federal safety laws. The federal legislation, however, does not deprive state courts of jurisdiction of causes of action arising thereunder, nor of the power to enforce in such actions local

[1] *Central Vermont Ry.* v. *White, supra.*

[2] *New Orleans and Northeastern R. R.* v. *Harris* (1918), 247 U. S. 367; *New Orleans and Northeastern R. R.* v. *Scarlet* (1919), 249 U. S. 528; *Yazoo and Mississippi Valley R. R.* v. *Mullins* (1919), 249 U. S. 531.

rules which are purely precedural, such as those relating to the form of the action, the sufficiency of the pleadings and the rules of evidence.

Finances and Management

In the absence of conflicting federal legislation, the states possess extensive authority to regulate the finances and management of interstate carriers. This authority springs from two principal sources, namely, the power to regulate intrastate commerce and the power to create corporations, incidental to which the state may grant or withhold various corporate powers and attach conditions to the grant which are in fact regulations of corporate management. But Congress by various laws has assumed jurisdiction over the business affairs of interstate carriers to such a degree that state power has been very much restricted with respect to such matters as their accounts, their issue of securities, their intercorporate relations, their contracts for supplies, construction or maintenance, and their relations with their employees.

Federal regulation of accounts is found in Section 20 of the Interstate Commerce Act. This section authorizes the Interstate Commerce Commission to require detailed annual reports of the financial affairs and operations of interstate carriers, and to prescribe the manner in which they shall keep a uniform system of accounts.[1] The Commission may prescribe the forms of any and all accounts, records and memoranda to be kept and the amount of depreciation which may properly be included under operating expenses.[2] From the standpoint of state power the most important provision of this section is that which declares that "it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Com-

[1] Section 20 (1).

[2] Section 20 (5).

mission ".[1] Both the failure to keep the prescribed accounts and the keeping of unauthorized accounts are subject to severe penalties.[2] This legislation as interpreted by the Court applies to all accounts of interstate carriers, whether they relate to interstate transportation or not.[3] It is, therefore, clear that the exercise of state power to regulate the accounting methods of carriers subject to the Interstate Commerce Act is severely restricted by federal legislation. If the states should either attempt to require the keeping of forms of accounts not authorized by the Commission, or prohibit the keeping of forms of accounts authorized or required by it, they would in either case be acting directly in conflict with the provisions of federal law and their action would be void.

Under the provisions of Section 20a of the Interstate Commerce Act, Congress has assumed complete jurisdiction over the subject of the issue of securities by interstate steam railroads. This section, added in 1920, makes it unlawful for any such railroad to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the railroad, or to assume any obligation or liability in respect of the securities of any other person or corporation without the authorization of the Interstate Commerce Commission.[4] Short-term notes for limited amounts are excepted from this requirement.[5] Provision is made for giving the authorities of the state in which the railroad operates an opportunity to be heard by the Commission, but their function is purely advisory.[6] The paragraph of this section which defines its effect upon state power reads as follows:

[1] Section 20 (5).

[2] Section 20 (6) (7).

[3] *Interstate Commerce Commission* v. *Goodrich Transit Co.* (1912), 224 U. S. 194; see pp. 133, 134, *supra*.

[4] Section 20a (2).

[5] Section 20a (9).

[6] Section 20a (6).

The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section *without securing approval other than as specified herein.*[1]

Thus the states clearly cannot validly authorize or require the issue of securities by interstate steam railroads without the approval of the Interstate Commerce Commission. It has already been pointed out that these provisions deprive the states of authority to order the installation of facilities for handling intrastate traffic where the issue of securities is necessary to provide funds for the improvement.[2]

In spite of the sweeping provision quoted above, to the effect that the jurisdiction of the Interstate Commerce Commission over the issue of securities is exclusive and plenary, it cannot be asserted with confidence that all state power to prevent the issue of securities is suspended. In the case of a corporation, it must possess by its charter the corporate power to issue stocks or bonds for such securities to be valid. Let us suppose that a railroad corporation has already exhausted the powers to issue securities granted to it by the corporate charter of the state under whose laws it was created, and thereafter applies to the Interstate Commerce Commission for authority to issue more securities. Can the provisions of Section 20a be interpreted as granting to the Commission the authority to create corporate powers which do not exist otherwise? If not, the state from which the corporation derived its charter could effectively prevent the issue of securities authorized by the Commission by merely refraining from granting the necessary corporate power. It is clear, however, that any state statute requiring the approval

[1] Section 20a (7). Italics mine.

[2] See *Railroad Commission of California* v. *Southern Pacific Co.* (1924), 264 U. S. 331; p. 333, *supra*.

of state authorities for the issue of securities within the corporate powers of the corporation would not be applicable to issues approved by the Interstate Commerce Commission.

Congress seems to have deprived the states of power to authorize or prohibit the pooling of intrastate traffic or revenue by interstate carriers by the provisions of Section 5, paragraph (1) of the Interstate Commerce Act. This paragraph makes it unlawful for an interstate railroad to enter into any contract, agreement or combination with another road for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof, without the approval of the Interstate Commerce Commission, but the Commission is authorized to approve pooling which will be in the interest of better service to the public or economy in operation, and will not unduly restrain competition. The authority to approve pooling was inserted by the Transportation Act of 1920, and is a part of the general plan of that Act to place in the hands of the Commission the care and supervision of the finances of carriers for the purpose of providing an adequate national system of transportation. In the light of this purpose, the provisions of the paragraph appear to apply to the pooling of even the intrastate traffic of interstate railroads, as any economies which may be obtained from such pooling would be reflected in the financial ability of the railroads to provide adequate interstate service just as much as economies resulting from the pooling of interstate traffic or revenues. So interpreted, the paragraph deprives the states of power to regulate this subject even with respect to intrastate traffic because the states could neither authorize pooling not approved by the Commission, which is prohibited by federal law, nor prohibit pooling authorized by the Commission, without directly violating the provisions of the Interstate Commerce Act.

The Act contains an express provision that the railroads are relieved from the operation of all restraints or prohibitions by law, state or federal, in so far as may be necessary to enable them to do anything authorized or required by the Commission pursuant to the provisions of the section relating to pooling.[1]

Federal legislation upon the subject of the consolidation of interstate railroads gives such complete jurisdiction to the Interstate Commerce Commission that it is difficult to see how any exercise of state power could possibly be sustained. The provisions of the Interstate Commerce Act at present in force empower the Commission to authorize any carrier engaged in interstate transportation and subject to the Act to acquire control of another such carrier in any manner not involving their consolidation into a single system for ownership and operation upon such terms and conditions as the Commission shall find to be just and reasonable.[2] The consolidation of interstate railroad properties into one corporation for the ownership, management and operation of the properties is lawful by the terms of the Act only when the consolidation is in harmony with and in furtherance of a complete plan of consolidation to be formulated and approved by the Commission.[3] The Commission has confessed its inability to formulate such a plan, and one of the purposes of bills now pending in Congress is to remove this restraint upon consolidation. As matters stand at present, therefore, combinations falling short of complete consolidation of ownership and operation may be made upon terms prescribed by the Commission and complete consolidation of interstate railroads for ownership, management and operation is unlawful. The same provision relieving carriers from the re-

[1] Section 5 (8).

[2] Section 5 (2).

[3] Section 5 (4) (6).

straints of state law when pooling is authorized by federal order, applies to orders of the Commission authorizing the acquisition of control of other carriers.[1] Since the combination or consolidation of interstate railroads is subject to the administrative discretion of the Interstate Commerce Commission, except as prohibited by the Act, the exercise of state authority on the same subject is clearly precluded by the recognized principle that the jurisdiction of the Commission is exclusive in matters of administrative discretion entrusted to its control.

Congress has regulated the subject of interlocking directorates of interstate railroads in such a way as to remove this matter from state control. The Interstate Commerce Act makes it unlawful for any person to hold the position of officer or director of more than one steam railroad engaged in interstate commerce unless such holding shall have been authorized by an order of the Commission upon due showing that neither public nor private interests will be adversely affected thereby.[2] The subject being thus placed within the administrative discretion of the Commission, any exercise of state power authorizing or prohibiting the simultaneous holding of office in two such railroads would clearly conflict with the provisions of federal law.

Congress has regulated the business dealings of interstate carriers in securities, supplies or other articles of commerce, and their contracts for construction or maintenance of any kind. The Interstate Commerce Act prohibits any officer or director of an interstate steam railroad from deriving personal benefit from the sale or other disposition of the railroad's securities.[3] The Clayton Act requires that dealings by a common carrier in securities, supplies or other articles

[1] Section 5 (8).

[2] Section 20a (12).

[3] Section 20a (12).

of commerce, or contracts for construction or maintenance to the amount of more than $50,000 in the aggregate in any one year with another corporation, firm, partnership or association, shall be with the most favorable bidder ascertained by competitive bidding, if the carrier shall have upon its board of directors or as its president, manager or as its purchasing or selling officer or agent in the particular transaction any person who is at the same time a director, manager or purchasing or selling officer of, or who has any substantial interest in, the other concern.[1] Full power is given to the Commission to prescribe the administrative details of and to enforce these provisions. In accordance with the general principles of interpretation applied to other forms of federal legislation, it is apparent that the states are deprived of power to prescribe other or different rules for such dealings and contracts, and to enforce other or different penalties for their violation. Since the Clayton Act applies to all common carriers engaged in interstate commerce, its provisions are not limited to the particular classes of carriers subject to the Interstate Commerce Act and include street railways, carriers by motor vehicle and independent water carriers, any part of whose traffic is interstate. The resulting restraint upon state power to regulate the dealings and contracts of such carriers is correspondingly broad.

The entire matter of the settlement of industrial disputes between interstate carriers by railroad and their employees is exhaustivly covered by Congress in the Railway Labor Act of May 20, 1926.[2] This legislation not only sets up elaborate machinery for the disposition of such disputes, such as boards of adjustment to be appointed by the carriers and their employees, a federal board of mediation, and boards of arbitration to be chosen as provided by the Act,

[1] Act of October 15, 1914, 38 Stat. L. 730, Section 10.

[2] 44 Stat. L. 577.

but also prescribes in detail the procedure to be followed in the adjustment of the disputes. If a dispute is not otherwise adjusted, the Act authorizes the appointment of an emergency board to investigate and report within thirty days respecting such dispute, and imposes upon both carriers and employees the duty of preserving the *status quo* until thirty days after such board has made its report. The Act is, therefore, clearly such a complete assertion of federal jurisdiction over the subject of the settlement of industrial disputes of interstate railroads as to prevent the exercise of state power to regulate this subject. The Act is so new that no Supreme Court decision thus interpreting its effect upon state power has been rendered, but it can be asserted with confidence that the states may not regulate this subject in view of the many decisions relating to other federal laws.

This review of federal legislation shows that the reserved powers of the states, which survived the adoption of the Constitution, have suffered severely from the exercise of the federal powers created by that instrument. The chapter will now be summarized by an enumeration of the most important limitations upon state powers resulting from the enactment and operation of laws of the United States affecting interstate carriers.

The common-law obligation of carriers to render interstate transportation service at reasonable rates, formerly enforceable in the state courts, has been superseded by a similar statutory obligation imposed by the Interstate Commerce Act which cannot be enforced with respect to charges made in accordance with published tariffs until the Interstate Commerce Commission has rendered its decision concerning their reasonableness. The states cannot prescribe the general level of intrastate rates, nor even prescribe particular intrastate rates for transportation over which the Interstate Com-

merce Commission has assumed jurisdiction by orders protecting the interstate commerce of particular shippers or localities from discrimination. They are powerless to establish and enforce any rule defining the carriers' liability for the safe transportation and delivery of interstate freight shipments. State statutes imposing penalties for failure to render prompt or non-discriminatory transportation service upon reasonable request are not enforceable with respect to interstate shipments, if they were enacted subsequent to the Hepburn Act of 1906, and earlier state statutes of this character may not be applied to such shipments if their enforcement requires an administrative determination of the justice and reasonableness of the carriers' regulations and practices. The power of the states to regulate intrastate transportation service is subordinate to lawful orders of the Interstate Commerce Commission regulating such matters as car distribution and the use of facilities, concerning which any effective rule must be equally applicable to both interstate and intrastate traffic. This power is further limited by the provisions of federal law which prevent a state from authorizing or requiring a railroad engaged in interstate commerce to extend its lines or from prohibiting the abandonment of parts of its lines, even when the extension or continued operation is desired solely for intrastate traffic. State power to require adequate facilities for intrastate commerce is also distinctly crippled by the necessity of obtaining federal authority for the issue of securities to finance improvements. Various subjects relating to public safety have been withdrawn from the field of state regulation. These include the equipment of cars and locomotives of interstate railroads with safety devices, the standards of inspection with which these locomotives must comply, the use of automatic train-control devices on such railroads, and the hours of service of employees engaged in the movement of interstate trains. To this

list should also be added the regulation of the civil liability of railroads to their employees for failure to comply with federal laws enacted to promote safety, and for the injury or death of employees engaged in interstate commerce resulting from any cause. Among the most important restraints upon state power to regulate the finances and management of interstate railroads are those imposed by laws of the United States asserting jurisdiction, inconsistent with the further exercise of state authority, over their accounts, their issue of capital securities, the pooling of traffic or revenues, consolidation, interlocking directorates, their business dealings in purchasing supplies and contracting for construction or maintenance, and the settlement of industrial disputes with their employees.

This formidable array of limitations upon state power is not, of course, a complete summary of the present situation. It is merely supplementary to the restraints resulting from the original constitutional grant of federal commercial powers which have been discussed in the preceding chapters. The combined effect of the Constitution itself as interpreted by the United States Supreme Court and of the legislative and administrative acts of federal authorities in pursuance of constitutional powers is encountered throughout the entire field of regulation of carriers engaged in interstate commerce. The resulting situation has aroused a demand for amendments to federal laws which will permit a broader exercise of the states' reserved powers. We are now in a position to outline the present distribution of state and federal power, to point out the possibilities for a readjustment of this distribution, and to call attention to some of the pending proposals to remove restraints upon state authority. This will be the subject of the concluding chapter.

CHAPTER VI

The Present Distribution of Power and Proposed Changes

We have in the continental United States a net-work of more than a quarter of a million miles of railroad lines which the United States Supreme Court has called a "national railway system".[1] The unity implied in this term is a unity of function, not of organization. That function, which this entire system unites in performing, is the transportation of passengers and freight from state to state. From the standpoint of ownership, management and operation the system is composed of several hundred separate units many of which do not cross state lines, but must be regarded as a part of the national system because of their participation with connecting roads in the continuous transportation of passengers and freight between points in different states.

Facts and circumstances which affect the interstate commerce of any one of these separate units or their combined capacity to provide adequate interstate transportation are now regarded as matters of national concern which justify the exercise of the constitutional power of Congress to regulate commerce between the states, or to make such laws as are necessary and proper for the execution of this power. Subject to the provision of the Fifth Amendment prohibiting the taking of liberty or property without due process of law, the power of Congress and its subordinate agencies to regulate the affairs of each unit of the national system of

[1] *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. R.* (1922), 257 U. S. 563, 585.

transportation is without substantial limitation if a reasonably close connection can be established between the proposed federal regulation and commerce between the states. Very few of the problems arising in the regulation of these roads are wholly unrelated to their interstate commerce. The same facilities and equipment are used for both interstate and intrastate traffic. Therefore, the regulation of their use in intrastate commerce usually has a direct bearing on the road's capacity as an interstate carrier. The same treasury supplies the funds for rendering each class of service. Therefore, any regulation which augments or depletes that treasury is reflected in the financial ability of the road to provide adequate and efficient interstate transportation.

These direct relations between interstate and intrastate transportation are the basis of the recent decisions sustaining federal regulation of railroad operations which are primarily intrastate. The most extreme are those which held that the Interstate Commerce Commission may prescribe the general level of intrastate rates and authorize an interstate railroad to abandon local service on a branch located wholly within one state. But federal power to regulate the affairs of these railroads is not absolutely unlimited. It is impossible to trace a substantial connection between some kinds of regulation and interstate commerce. This may be said of the adjustment of the relations between particular intrastate rates with which federal authorities may not interfere if it is made without disturbing the aggregate revenue from intrastate operations and without discrimination against particular interstate traffic. The Court has also held that Congress may not regulate the general rule of liability for the injury or death of employees not engaged in interstate operations because interstate commerce is not affected thereby.[1] This decision, however, was rendered nearly

[1] *Employers' Liability Cases* (1908), 207 U. S. 463.

twenty years ago, before the intimate relation between intrastate operations and interstate commerce had been fully recognized. If statistics could be presented to prove that the careless operation of interstate trains caused many casualties to employees not engaged in interstate commerce, a very strong argument could be made to sustain federal power to impose a strict rule of liability applicable thereto, just as federal regulation of liability to such employees for injuries resulting from defective safety appliances has been sustained. The subjects concerning which federal regulation of interstate railroads is not permitted are, however, comparatively unimportant. The fact that a railroad is a part of the national railway system means that the federal government has power, not only to prescribe the terms and conditions upon which it shall transport passengers and freight between the states, but also to regulate the vast majority of its other affairs because they have a substantial relation to its capacity as an interstate carrier and the character and efficiency of its interstate transportation service.

The constituent units of the national railway system have been most comprehensively regulated by Congress and we, therefore, have numerous Supreme Court decisions giving this broad interpretation of federal power to regulate railroads. The fact that other classes of interstate carriers are not subject to the provisions of much of the federal legislation does not, however, indicate the absence of federal power to exercise the same degree of control over them. When Congress finds that the protection of commerce between the states requires similar regulation of carriers other than railroads engaged in such commerce, we may confidently expect that its power to impose such regulation will be sustained. The same principle that has been applied to the power of Congress to regulate railroads engaged in interstate commerce is equally applicable to common carriers operating

over the public highways, by water or by air. Any of their affairs which have a substantial relation to their interstate transportation service are subject to such federal control as Congress in the exercise of its legislative discretion may find necessary and proper for the effective regulation of interstate commerce.

State action affecting any part of the national railway system must run the gauntlet of several tests to establish its validity. These tests may be put in the form of questions concerning a state law or order as follows:

1. Does it conflict with the express provisions of valid federal laws or orders?
2. Does it conflict with an implied intention of Congress to assume exclusive control of the subject to which it relates?
3. Does it regulate interstate commerce?
4. Does it regulate a subject which requires a single, uniform rule or plan of regulation?
5. Does it burden interstate commerce?

An affirmative answer to either of the first two questions immediately condemns the proposed state action. But if it is not found to conflict with valid federal legislation, we may then proceed to the question whether the state law or order regulates interstate commerce. At this point we have the highly convenient and elastic rule that some forms of state action incidentally affect interstate commerce without being a regulation thereof. If the law or order may be thus characterized, it is valid. But when we are constrained to call it a regulation of interstate commerce, we must apply the fourth and fifth tests. If the subject is a part of the general subject of interstate commerce which requires a single uniform rule or plan of regulation, the state action must be condemned. Where, however, the subject permits of diversity of regulation adapted to local conditions, as in

the case of switching service, the fact that a state is regulating interstate commerce does not invalidate its action. In such a case we may proceed to the final test, and the state law or order may be sustained if the regulation imposed thereby does not amount to a burden.

This outline of the theory of the validity of state laws or orders affecting interstate carriers contains several very elusive terms and distinctions. The determination of the implied intention of Congress to assume exclusive control of a subject, the distinction between regulations of interstate commerce and state action only incidentally affecting that subject, the necessity for uniformity of regulation, and the difference between a regulation and a burden all permit the widest exercise of discretion in judicial interpretation. In applying such a list of abstract tests it is inevitable that the Court should be greatly influenced by its own views concerning the advisability of permitting particular forms of state regulation, which in turn depend upon its interpretation of economic facts. When the intention of Congress is not unequivocally expressed, state action is often sustained or condemned according to the Court's judgment of the extent to which local necessity justified interference with interstate commerce in view of the particular facts and circumstances in the case. The statement of abstract rules is, therefore, a very inadequate guide to definite knowledge of the present scope of state power. The existing situation cannot be described even in outline without specific reference to particular kinds of regulation.

In spite of these various barriers to the exercise of state power, the national railway system is still subject to a very substantial amount of state control. If a shipper believes that the rates charged for intrastate shipments give undue preference or advantage to his local competitors, he may apply to his state commission for relief which may be given

if it does not change the general level of intrastate rates nor cause discrimination against interstate shippers. The railroads must obey state laws or orders prescribing the frequency and character of intrastate passenger service unless they interfere unreasonably with interstate transportation. Interstate passenger trains may be required by state authority to stop at designated points when necessary to provide adequate service to other points in the same state. The use of existing tracks and equipment may be regulated by the states to protect the public needs for intrastate freight service provided that the state regulation does not conflict with service orders of the Interstate Commerce Commission. The states may authorize or require the construction or continued operation of spur, industrial, team, switching or side tracks, wholly within one state, even for the purpose of interstate transportation. They may also order the construction of minor station facilities required for intrastate traffic, but their power in this respect does not extend to improvements made by one road for the use of other roads, requiring relocation of main line track, or involving the issue of capital securities.

Although Congress has assumed exclusive control of safety devices on locomotives and cars, the installation of automatic train control, the hours of service of employees engaged in the movement of interstate trains, and the transportation of explosives, other forms of safety regulation may be prescribed by the states. The national railway system is forcibly reminded of the existence of state power to require the protection or elimination of grade crossings by the numerous state laws relating to this subject which impose staggering financial burdens upon the railroads. Other permissible forms of state safety regulation are full-crew laws, laws regulating the hours of service of employees not engaged in the movement of interstate trains, building and

fire codes applicable to their fixed structures, and factory laws which must be observed in their shops. The states may also regulate the liability of railroads for the death or injury of employees not engaged in interstate commerce except in cases arising from violation of federal safety laws.

As practically all railroads are operated by corporations deriving their existence and powers from state charters, state control of their corporate affairs is still very extensive. They must observe the conditions and provisions of their charters and the general provisions of the corporation laws of the states of their incorporation, unless they are constrained to do otherwise by some valid federal law or order. The states may thus regulate, in the absence of conflicting federal action, such matters as the forms of business in which a corporation may engage, the corporate organization, the rights of stockholders, the time, place and manner of holding corporate meetings, the number and qualifications of directors, the publicity of corporate records, the form and contents of reports, and many other details of management. With respect to the corporate powers to issue securities and to acquire control of other railroads, the present status of a state's control of the railroad corporations it creates is somewhat confused. It is clear that neither of these powers may be exercised without federal approval, and that both may be exercised with federal approval notwithstanding conflicting provisions of state laws. But the exercise of a power implies its existence, and unless the Interstate Commerce Act is interpreted as authorizing the Commission to create corporate powers not otherwise existing, a state grant of corporate power to issue the class of securities authorized by the Commission or to purchase stock, lease or otherwise contract for control of other railroads seems a prerequisite to such action. Another important power still subject to state control is that of eminent domain. The

states may still prescribe the terms and conditions under which a railroad may acquire private or public property or the use thereof for the construction and operation of its line.

In the field of taxation the national railway system is particularly sensitive to the fact that a very large measure of state power still remains. From reading the numerous decisions refusing to sustain various forms of state taxation, one might obtain the impression that the taxing power of the state is seriously crippled so far as interstate carriers are concerned. This is not the case. The number and variety of valid forms of taxation are quite sufficient to make the national railway system one of the most fruitful sources of revenue for the states. They may impose property taxes on all property within their borders, including not only real estate and tangible personal property, but also those intangible elements of value which result from use of property within the state as part of a general system of interstate and intrastate transportation. They may tax the net income attributable to operations, both interstate and intrastate, within the taxing state. They may tax the gross receipts derived from intrastate traffic. They may tax the exercise of the franchise to be a corporation granted by the taxing state provided that the tax is not measured by the volume of interstate traffic. They may even tax the privilege of doing intrastate business in the taxing state exercised by corporations created by other states subject to the restriction that such a tax must not be measured by elements not directly subject to the jurisdiction of the taxing state, such as property or business transacted beyond its borders, or the volume of interstate traffic.

Federal power has been most extensively exercised and in consequence state powers have been most restricted with respect to steam railroads, and the electrically operated parts of steam railroads, which are engaged in interstate com-

merce, either by actually transporting passengers and freight across state lines, or by participating with their connections in continuous transportation between points in different states. Yet carriers of this class are subject to all the forms of state regulation which have just been enumerated. In addition thereto other state powers are found to exist in the regulation of other classes of carriers engaged in interstate transportation.

State certificates of necessity and convenience may be required for the construction, operation or abandonment of street, suburban, or interurban electric railways not operated as part of a general steam-railroad system. This power cannot be exercised to exclude an electric railway from entering a state solely for interstate traffic, but in the vast majority of cases an electric railway cannot live without intrastate traffic and, therefore, the construction, extension or abandonment of the lines of this class of carriers is subject to comprehensive state regulation even when they are engaged in interstate commerce. The states may also require a carrier engaged in interstate transportation by motor vehicle over the public highways to obtain a state certificate of necessity and convenience before operating intrastate service as a common carrier. State power to require a certificate of necessity and convenience for the operation of intrastate service is, as a practical matter, less effective in the regulation of motor-vehicle carriers than in the regulation of electric railways. The carrier by motor vehicle finds it far less difficult to avoid this form of state regulation by confining his operations to interstate traffic. He is not compelled to bear the entire burden of the construction and maintenance of the permanent way on which he operates, a burden, which in the case of electric railways, usually requires some contribution from intrastate traffic.

The states also possess very comprehensive power to reg-

ulate the charges for intrastate transportation by street electric railways, motor vehicles, and interurban railways not engaged in the general transportation of freight, even when the same carriers are also engaged in interstate commerce. The general level of the intrastate charges of these classes of carriers is still subject to state regulation because Congress has not included them in the rate-making policy prescribed by Section 15a of the Interstate Commerce Act under which the Interstate Commerce Commission has required intrastate charges to conform with the interstate rate structure.

Some economic effects of the distribution of power between the state and federal governments should be pointed out. Foremost among these is the increased financial stability which proceeds from unification of regulation. There are many factors affecting the financial capacity of railroads to provide adequate transportation facilities and to render efficient service commensurate with public demand. A railroad may find itself financially embarrassed by low rates, high operating costs, high taxation, or requirements of unproductive additions or improvements. If none of these factors were subject to a uniform plan of regulation, a railroad operating in several states would find its earning capacity and credit fluctuating with diverse and conflicting policies of the various states in which it operates concerning such matters as the rate of return which it should be permitted to earn, the value of the property to which the rate of return should be applied and its obligations to extend or improve its service. Under these circumstances the investor would have less confidence in railroad securities than if he believed that his investment would receive the protection of a uniform plan of regulation. To the extent that the present distribution of power assures a uniform plan of regulation, it, therefore, strengthens the ability of the railroads to obtain capital funds without which needed facilities cannot be provided.

It must not be supposed that all the factors affecting credit and earning capacity are subject to a single uniform control. The cost of operation in most respects is unregulated, the aggregate amount paid in taxes varies with the taxing policy of the various states in which each railroad operates, and the states still have the power to require some forms of capital expenditures, such as the protection or elimination of grade crossings, which are to a large extent unproductive from the standpoint of railroad finance. Notwithstanding the absence of uniform regulation of these factors, the Interstate Commerce Commission can give substantial protection to the credit and earning capacity of interstate railroads through its powers to regulate the aggregate amount of revenue received from all traffic, both interstate and intrastate, to prohibit unproductive extensions of the main line or branches either by construction or by acquisition of other roads, to authorize the abandonment of existing portions of the line, and to prevent the issue of securities in circumstances detrimental to the credit of the roads. The exercise of these powers, and in particular the power to regulate the general level of rates, may be used to offset drains upon the treasury of a railroad resulting from such causes as high operating costs, high taxation, and expensive grade-crossing improvements. We must recognize, however, that federal power to promote financial stability is not unlimited. Both political and economic considerations tend to restrict the use of the power to regulate rates as a means of augmenting aggregate revenues. The shipping public is not disposed to acquiesce without protest in substantial increases of their payments for transportation, and can exert very powerful political pressure to influence congressional action. "What the traffic will bear" also must be considered. There is a point beyond which rates cannot be profitably increased, particularly in the case of commodities of low value in pro-

portion to weight or bulk where transportation charges represent a large part of the final cost to the consumer. When rates are raised beyond this point, the traffic diminishes in volume or disappears and net earnings are consequently curtailed. But these restrictions on the exercise of federal power do not prevent its being a very effective instrument for the protection of railroad credit and earning capacity. Without detracting from the part efficient management has played, we must recognize that the present financial stability of our national railway system is to a considerable extent attributable to the concentration in the Interstate Commerce Commission of power to regulate rates, construction and abandonment, and the issue of securities, and to the extension of such regulation to the intrastate operations of interstate railroads.

Another effect of the present distribution of power is the protection of interstate traffic from discriminatory state action. One of the fundamental principles of our federal commercial system is freedom of trade between the states. This principle would clearly be violated by the imposition of duties upon commodities crossing state lines. But from the purely economic standpoint the freedom of interstate trade would be just as much restricted by a situation in which an intrastate shipper pays five dollars a ton less than his interstate competitor for the transportation of the same commodity the same distance to the same market, as by the imposition of a duty of five dollars a ton at the state line. The federal government has power to restrain the states from creating or maintaining any such discrimination. This is the principle of the Shreveport decision[1] and is given statutory expression in Section 13, paragraph (4), of the Interstate Commerce Act.

[1] *Houston, E. & W. T. Ry.* v. *United States* (1914), 234 U. S. 342. See pp. 139-142, *supra*.

The freedom of trade between the states is further promoted by the prevention of multiple regulation of the terms and conditions upon which interstate transportation service is rendered. An extreme illustration is afforded in the case of commodities moving by rail between the North Atlantic and Pacific coasts. Even by the most direct routes such traffic must enter at least nine different states. In exercising its power to prescribe a uniform rule of regulation of this traffic, the Interstate Commerce Commission has found the utmost difficulty in satisfying the sectional demands of the various localities through which it passes. It needs no elaboration of argument to show that the movement of this traffic would be very materially hampered if each of the nine states had power to prescribe the rates and classifications applicable to the part of the haul within its borders, and the character and specifications of the equipment used for its transportation.

An exceedingly one-sided presentation of the situation would be given if only these economic benefits derived from the present distribution of power were pointed out and no reference were made to its unfavorable aspects. The overwhelming burden of responsibility which is now placed upon the Interstate Commerce Commission tends to impair the efficiency of regulation. It is not necessary to give a complete list of its statutory duties to show that it is unreasonable to expect prompt and careful consideration of all matters referred to it. An enumeration of a few of its more important functions will suffice for that purpose. It must hold hearings and render decisions on complaints alleging violation of the Interstate Commerce Act, on new schedules of rates which have been suspended pending investigation, on applications for certificates of convenience and necessity covering proposed construction, extension or abandonment, on applications for authority to issue securities, and on appli-

cations for authority for a road to acquire control of other roads. Legislation will probably be enacted at the next session of Congress enlarging the power of the Commission with respect to the consolidation of interstate railroads. It must supervise the regulation of the general level of rates throughout the country to provide the fair return contemplated by Section 15a of the Interstate Commerce Act, and in this connection it has to conduct long and complicated investigations such as those resulting from the applications of the western railroads for increased rates, and from the Hoch-Smith resolution of January 30, 1925,[1] requiring an investigation of the rate structure with a view to making readjustments as between various localities, classes of traffic and classes of commodities, with particular reference to the existing depression in agriculture. It is required to enforce the provisions of the Interstate Commerce Act for the recapture of earnings in excess of a fair return and for the administration of the fund resulting from such recapture. It must supervise and prescribe the methods of accounting for interstate railroads, which entails complicated work, such as that involved in the recent re-classification of carriers' accounts and the order concerning the establishment of depreciation reserves. In 1913 the Commission was charged with the duty of making a complete valuation of the properties of the railroads subject to its jurisdiction, which has demanded the constant attention of the Commission for fourteen years, which has not yet resulted in a final valuation of any large railroad system, and which in its nature can never be completed because of the necessity of constant revision occasioned by additions, improvements and retirements. It is charged with the enforcement of the various federal laws for the promotion of safety such as the Hours of Service Act, the Safety Appliance Acts, the Boiler In-

[1] 43 Stat. L. 801.

spection Act, and the provisions of the Interstate Commerce Act concerning automatic train-control devices. It must decide applications for permission for a person to hold a position as officer or director of more than one carrier. It must execute various provisions of the Clayton Anti-Trust Act relating to interstate carriers including the supervision of dealings with other corporations having the same officers. Some idea of the volume of work which all this entails may be obtained from a statement in the annual report of the Interstate Commerce Commission for the year ending October 31, 1926, that 1524 formal complaints were filed with the Commission during the year covered by the report, and that the Commission decided 1035 cases so arising.[1] The hearing and decision of complaints is only one of the many functions which have been enumerated. During the same year the Commission conducted 1584 hearings and took over 300,000 pages of testimony.[2]

It should be clear from this statement of the volume of the Commission's work that it is physically impossible for the Commissioners to give prompt and careful personal attention to the innumerable problems which require decision by them. To a very large extent this work must be delegated to subordinates. This is illustrated by the practice governing complaints of violations of the Interstate Commerce Act. The hearings are usually conducted by an attorney-examiner who takes the testimony and prepares a tentative report for the adoption of the Commission. It is true that the parties may take exception to the examiner's report and may argue the matter before a division of the Commission sitting at Washington, but the fact remains that the findings and decision of the examiner frequently play an important part in determining the action of the Commission.

[1] Interstate Commerce Commission, *Annual Report*, 1926, p. 33.

[2] *Ibid.*

Another result of the concentration of regulatory power in the Interstate Commerce Commission is the delay in obtaining final decision on complaints and other proceedings brought before the Commission. The 1926 report of the Commission refers to a plan of "shortened procedure", which eliminates the taking of testimony and provides for decision on written memoranda offered by the parties. In cases handled in this way the Commission states that a decision is reached on an average of 455 days from the receipt of the complaint and 359 days from the receipt of the memorandum of facts.[1] It does not give figures for the time taken in disposing of cases in which testimony must be taken, but the average time in such cases presumably exceeds that in cases where the shortened procedure is used. In some matters expeditious disposition of proceedings is very vital, as where the development of new territory depends upon the prompt construction of railroad facilities. The possibility of delay in obtaining federal authority for construction is shown by a recent decision of the Commission disposing of six applications for certificates of necessity and convenience to authorize the construction of new lines in the South Plains of the Panhandle section of Texas.[2] The first of these applications was filed July 20, 1923, on which hearings commenced in November of that year. The final decision of the Commission was not rendered until November 8, 1926. It then authorized the construction of approximately 200 miles of railroad pursuant to two of the applications, filed respectively in April and July, 1925, on which hearings were held in July and October of that year, and denied the other four applications. It is not surprising that Senator Mayfield and Representative Jones, both of

[1] Interstate Commerce Commission, *Annual Report*, 1926, p. 5.

[2] *Construction by Fort Worth and Denver South Plains Ry.* (1926), 117 I. C. C. 233.

Texas, have introduced bills to remove the requirement of a federal certificate of necessity and convenience for the extension of railroads.

A further result of the present centralization of power is that many questions which are primarily of local concern are decided by authorities not fully familiar with local needs and conditions. The intervention of a state line does not always give national importance to problems arising in connection with short-haul traffic which happens to cross that line. For example, the metropolitan areas of the cities of New York, Philadelphia, Chicago and St. Louis are intersected by state lines, but the regulation of transportation between points in those areas requires the most intimate knowledge of local conditions. It is too much to expect examiners or Commissioners to acquire such knowledge, which should be the product of years of experience and observation, from the consideration of the testimony in a single case. Furthermore, the exercise of federal power is now extended to many transactions, which geographically are purely intrastate, but have a substantial connection with transactions of interstate commerce. This relationship presents a very real difficulty in balancing local needs against the interests of interstate transportation, and in many transactions in which local considerations are predominant there is danger that strangers to the situation will fail to appreciate the necessities of the case. This is one of the reasons urged for the restoration of state authority to authorize extensions of interstate railroads to be located wholly within one state, and to prohibit the abandonment of their operations for intrastate traffic, it being argued that in many cases the effect upon interstate commerce is insignificant as compared with local needs for intrastate service.

The comment on the effect of the extreme concentration of power in the Interstate Commerce Commission is not in-

tended in the least as a criticism of the Commission. The purpose is rather to point out the inherent defects of the system of regulation under which it acts. These defects could undoubtedly be removed by distributing some part of the power now exercised by the Interstate Commerce Commission to state authorities, but in proposing any such adjustment of our present distribution of power, careful consideration must be given to the possibility of losing the distinct benefits which flow from unified regulation.

As a result of the rule that interstate transportation is in general a subject requiring a uniform, nation-wide plan of regulation which Congress alone may prescribe, the regulatory process does not keep pace with the need for regulation. The states cannot act. Owing to the pressure of other duties Congress does not act. The result is often the absence of any regulatory policy. To the proponents of *laissez-faire* this is not without its bright side. It proves, however, embarrassing at times even to the carriers themselves. An illustration is given by the present situation concerning interstate motor-vehicle transportation over the public highways. At present such transportation is without regulation except that it is subject to the ordinary exercise of the state police power to protect health and safety. Any person or corporation may establish interstate motor-vehicle service as a common carrier without obtaining a certificate of necessity and convenience, and without being subject to any regulation of rates and service. In many localities there has resulted a situation of cut-throat competition by irresponsible carriers, which has led to a demand for regulation, not only from the railroads whose traffic has suffered thereby, but also from responsible concerns operating motor vehicles. It is hoped that the present session of Congress will adopt appropriate legislation to remedy this situation.

The long list of matters subject to state regulation, given

earlier in this chapter, should make it clear that the present distribution of power to regulate interstate carriers by no means eliminates the states. Many critics, however, believe that the effort to protect interstate commerce from state interference has gone too far. The criticism follows two general lines of thought. The first relates to the administrative defects of extreme concentration of power in a single regulatory body. It is possible to meet this criticism without a redistribution of state and federal power by the expedient of creating regional federal agencies which could relieve the Interstate Commerce Commission of much of its burden and would have the requisite knowledge of local conditions. The second line of criticism is political in the broadest meaning of that term, and necessarily demands a redistribution of power. It is based on the contention that the rights of the states to regulate their own internal affairs are seriously threatened and that the fundamental conception of our federal system of government requires that the states should be permitted to exercise their sovereign powers in ways that are now barred by federal statute or by judicial interpretation of the Constitution. When the barrier is interposed solely by federal statute, there is no serious difficulty attendant on its removal. In such a case the exercise of state power is now prohibited because it conflicts with the intention of Congress as expressed in or implied from federal statutes. The obvious remedy is to repeal or to amend the statutes so as to make it clear that Congress does not intend to restrict the exercise of state power conceded to exist in the absence of conflicting congressional action. But when the barrier arises from a United States Supreme Court decision declaring that the proposed exercise of state power is a regulation of a part of the subject of interstate commerce which requires a single and uniform plan of regulation, then the difficulties attending its removal are very serious. In

some way the Court must be persuaded to recede from its view, either that the proposed exercise of state power is a regulation of interstate commerce, or that the subject requires uniformity of regulation. This suggests two lines of approach. One is to attempt to convince the Court that the hindrance to interstate commerce resulting from the proposed exercise of state power is so small as compared with the local necessities for its exercise that the measure is primarily a regulation of the internal affairs of the state which incidentally affects but does not regulate interstate commerce. This effort may be successful if accompanied by an accurate and convincing analysis of economic facts, not previously presented to the Court, which will demonstrate that the actual interference with interstate commerce is insignificant in comparison with the local benefits to be derived therefrom. The other line of approach is suggested by the Court's decisions sustaining the Webb-Kenyon Act.[1] Those decisions indicate that in some circumstances the Court will recede from its view that a particular subject of interstate commerce requires uniformity of regulation, if Congress in substance declares that the subject permits diversity of regulation as determined by the legislatures of the various states. In sustaining the Webb-Kenyon Act, the Court permitted the rule of regulation of the interstate transportation of intoxicating liquor to vary with the laws of the states to which the liquor was consigned, notwithstanding its previous decisions that such transportation required uniformity of regulation. This clearly suggests the possibility of enlarging the scope of state power to regulate other subjects by acts of Congress declaring that particular forms of interstate transportation, such as transportation by motor vehicles over the public highways, shall be subject to the requirements of state law.

[1] *Clark Distilling Co.* v. *Western Maryland Ry.* (1917), 242 U. S. 311; *Seaboard Air Line Ry.* v. *North Carolina* (1917), 245 U. S. 298.

Various proposals have been made to remedy the defects of the present adjustment of state and federal power. These may be roughly grouped in three classes as follows:

1. To decentralize the administration of federal powers by the creation of regional federal agencies.
2. To accomplish the same result by authorizing state authorities to act as federal agencies.
3. To remove restraints upon state power by limiting the scope of federal regulation.

The first class does not involve any readjustment of the present distribution of power between the state and federal governments. It has a place in this discussion, however, because it offers an alternative remedy for the evil of extreme centralization which is one of the chief grounds for demanding an enlargement of state power. A proposal of this character has been made by Walter M. W. Splawn, President and Professor of Economics at the University of Texas and former member of the Texas Railroad Commission.[1] To quote Professor Splawn:

As a means of obtaining a more satisfactory organization for the regulation of interstate commerce, we should have a regional commission of three or five commissioners in each well defined freight territory. Six or seven such commissions might be required from the outset. They could be given final jurisdiction over matters local to their regions. Appeal could be taken to the Interstate Commerce Commission, somewhat as appeals are now taken from the lower courts to the Supreme Court. The details of the jurisdiction could be worked out in the interest of economy, the expedition of business, and the requirements of justice. The expense would be very little more than that incurred under the present system, for the government spends about as much on the salaries of attorney-examiners and

[1] *Railway Age*, November 27, 1926, pp. 1027, 1028.

their travelling expenses as would be required to maintain these regional commissions.

The great advantage of such an arrangement would be that the commissioners would themselves hear the testimony in the causes which they decide. They could better master the problems of a limited area than can the Interstate Commerce Commission as at present constituted. The regional regulatory body would be much closer to the people looking to it for relief and advice. Cases could be disposed of more promptly. The expense for presenting complaints would be far less than under our present system.

From these considerations it appears that it would be advisable to amend the act to regulate commerce so as to provide for regional commissions and define the jurisdiction of such regional commissions, with a view to giving relief both to the Interstate Commerce Commission and, more particularly, to the public.

The advantages of this plan of decentralization, as compared with plans for utilizing state boards or commissions in the execution of federal powers, lie in the fact that a single regional body could decide many problems of a local character, but involving the interests of more than one state, which would require the cooperation of more than one state commission for determination, and in the further fact that the creation of regional federal commissions is not open to attack as an unconstitutional delegation of federal power. The chief objection to the plan is that it further multiplies the number of regulatory bodies which may participate in the control of interstate railroads. Commissioner Joseph B. Eastman of the Interstate Commerce Commission, in an address at the 1926 convention of the National Association of Railroad and Utilities Commissioners, expressed the view that the solution of the problem of decentralization would not be found in regional commissions, but rather in the development of cooperation between the state and federal com-

missions.[1] This leads us to the second class of proposals which advocate the use of state boards and commissions as agencies of Congress in the execution of federal powers.

The Interstate Commerce Act authorizes the Interstate Commerce Commission to confer with state commissions with respect to the relationship between rate structures and practices of carriers subject to both state and federal jurisdiction, and to hold joint hearings with state commissions on any matters wherein it is empowered to act, and where the rate-making authority of a state is or may be affected by its action.[2] The Act also provides for giving notice of hearing to state authorities in applications to the Commission for authority to issue securities and for certificates of necessity and convenience.[3] The utmost effort has been made under the provisions of these sections to promote cooperation between state and federal authorities with very satisfactory results. The representatives of state commissions sit in various hearings with representatives of the Interstate Commerce Commission, and occasionally preliminary inquiry is left to the state bodies. In a note to Mr. Justice Brandeis' opinion in *Colorado* v. *United States,* he points out that from the enactment of the Transportation Act of 1920 to February 18, 1926, 191 abandonment applications were acted upon by the Interstate Commerce Commission, of which 170 were granted; of these only 6 were granted contrary to the recommendations of state authorities, and of 47 cases where state authorities made recommendations, the Commission acted in accordance therewith in 38 cases.[4] In the annual report of the Interstate Com-

[1] National Association of Railroad and Utilities Commissioners, *Proceedings,* 1926, p. 48.

[2] Section 13 (3).

[3] Sections 1 (19), 20a (6).

[4] (1926), 271 U. S. 153, 167.

merce Commission for the year ending October 31, 1926, it was stated that a check of the Commission's records discloses that 27 state commissions cooperated with the federal commission in 51 rate cases in which interstate-intrastate rate relations were in some manner involved, 22 state commissions cooperated in 44 construction and abandonment cases, and 6 in car-service cases.[1] The cooperative provisions of the Interstate Commerce Act, however, give absolutely no authority to the state commissions, and the enforcement of their views concerning regulatory matters requires the acceptance of those views by the Interstate Commerce Commission.

In a bill introduced in 1925 by Senator Pittman,[2] there is a provision to authorize the Interstate Commerce Commission to "request any State commission, or State commissioners representing more than one State commission to hold a hearing for the commission in any proceeding pending before said Interstate Commerce Commission, and to report recommendations or proposed findings for the disposition of such proceeding". This provision would merely operate to transfer to state commissions part of the work now performed for the Interstate Commerce Commission by attorney-examiners. It delegates no federal power to state authorities to make orders binding on the carriers, as their reports and recommendations would require confirmation by the Interstate Commerce Commission before becoming effective. It is, therefore, difficult to see how it would substantially reduce the burden of work to which the federal commissioners now give their personal attention, as the procedure would presumably be the same as that now followed by the commissioners after the filing of the reports and findings of the attorney-examiners who conduct the

[1] P. 1.

[2] S. 758, introduced December 8, 1925.

original hearings. Its advantage lies in the fact that the Interstate Commerce Commission, in reaching its final conclusions would have the benefit of the group opinion of a body of men who are presumably selected because of their long experience and familiarity with local conditions, instead of the opinion of one attorney-examiner not so well qualified to understand the issues involved in the case. Senator Pittman's bill contains other provisions, referred to later in this chapter, for a very material readjustment of state and federal power, but this particular provision merely extends the use of state commissions in an advisory capacity without giving them actual authority.

In 1920 Hon. George W. Anderson, Judge of the United States District Court for the District of Massachusetts, and former State Commissioner and Interstate Commerce Commissioner, delivered a very significant address entitled "State Commissions as Regional Federal Commissions" to the National Association of Railway and Utilities Commissioners.[1] In the course of this address he said:

> What is needed, now that the railroads are recognized as being essentially national in nature and function, is that there shall be a delegation by the Nation to the state officials of national power, together with a guarded but adequate right of review by the central national tribunal if and when the state commission really disregards national right and interests. It is not enough that the state commissions should, as of grace, exercising state powers and only state powers, be permitted to confer and cooperate (whatever those words may mean) with the national commission. Dealing with a problem which is in legal essence national, state commissions ought, if possible, to be given federal powers for local use. . . .
>
> Whether we like it or not, state functions as to railroad or-

[1] National Association of Railway and Utilities Commissioners, *Proceedings*, 1920, pp. 32-42.

ganization, administration and regulation are certain to diminish almost to the disappearing point. Practically, therefore, what I am trying to work out is a plan to keep in the hands of state officials a large part of the powers which they have hitherto exercised, by having those powers delegated to them from the real and ultimate source of railroad-control, to wit, the federal government. . . .

Somewhat more concretely—I think the federal railroad statutes should provide that commutation rates around our large cities, the elimination of grade crossings, the details of local service as to the time and number of trains, and their stopping at stations, and the functions otherwise necessarily shortly to be deputed to local examiners of the Interstate Commerce Commission, etc., should primarily be determined by the state public utility boards, acting for the federal government, with a guarded power of review or appeal to the Interstate Commerce Commission or to some division thereof if, and when, the local determination is found to involve, substantially, methods or practices or financial results of national moment. . . . Moreover, the Interstate Commerce Commission should of its own initiative retain power, on certiorari or analogous method, to bring before it for review or modification any record of proceedings before a state tribunal requiring, in the interests of uniformity or because of national prejudice, federal revision.

Judge Anderson went at considerable length into the question whether federal power could legally be delegated to state officials in this way, and came to the conclusion that Congress may constitutionally empower, but may not compel, state commissions to perform federal functions concerning the regulation of a national transportation system. Any federal statute granting such authority to state officials must, therefore, provide for the contingency of their refusing to act thereunder, either at their own discretion or because of the provisions of state law.

The plan thus suggested by Judge Anderson several years

ago is now of particular importance because of the growing demand that interstate transportation by motor vehicle over the public highways, particularly in the case of motor busses carrying passengers in competition with steam railroads, shall be subject to regulation. It is recognized that this character of traffic, even when it crosses a state line, presents problems which are largely of a local nature and which would greatly add to the burden of the Interstate Commerce Commission if that body were required to attempt their solution. The demand for the use of state commissions in regulating interstate traffic of this character is, therefore, very strong. Mr. A. G. Patterson, President of the National Association of Railroad and Utilities Commissioners, in addressing the 1926 convention of that body, said:

> Out of all the investigations and experience regarding motor vehicle regulation, it is becoming more and more apparent that existing local authorities should be employed as the agencies by which this regulation should be made effective. The peculiar nature of motor vehicle carriers, the fact that they must travel over highways provided largely by the states and counties and not over their own roadways, the fact that there will probably never be the same economic reasons for the ownership of such carriers or the operation thereof, to be consolidated or vested in one person, firm or corporation, operating across many states, and the manifest necessity for closer supervision than rail carriers require in order to protect the lives of the public and of passengers of such vehicles; these characteristics indicate not only that the states can best perform the task of regulating this traffic, but that effective regulation in this field is wellnigh impossible if performed by a single national body.[1]

A bill introduced by Representative Denison of Illinois to regulate interstate commerce by motor vehicles operating

[1] National Association of Railroad and Utilities Commissioners, *Proceedings*, 1926, p. 11.

as common carriers on the public highways seeks to make use of state commissions as agencies of Congress in the administration of such regulation.[1] This bill proposes the exercise of federal power to prescribe the substantive rules of regulation applicable to interstate motor-vehicle transportation. It does not suggest the delegation to state legislatures of any power to prescribe these rules of regulation. The authority which it seeks to confer upon state commissions is a purely administrative authority for carrying into effect the substantive provisions of federal law. Thus the bill provides that a carrier subject to its provisions must obtain a certificate that the public convenience and necessity requires its operation in interstate commerce and prescribes the criteria for determining whether the granting of a certificate is so required; the state commissions are merely entrusted with the administrative discretion of determining whether public convenience and necessity requires the granting of the certificate. The bill requires that the carrier shall furnish bonds with adequate corporate security binding the obligors to pay judgments arising out of the death or injury to passengers, or injury to other persons or property as the result of negligent acts, and the state commissions are entrusted with the administrative discretion of determining the amount of such bonds. The bill requires that charges shall be just, reasonable and non-discriminatory, and provides for the administrative determination of the justice or reasonableness of rates by a joint board composed of representatives of each state where any part of the service covered by the charge is performed. Provision is made for the Interstate Commerce Commission to act in place of any state commission which fails to file notice that it is prepared to act as authorized by the bill. The Interstate Commerce Commission is given jurisdiction to hear and finally determine ap-

[1] H. R. 15606, introduced December 22, 1926.

peals from any action by state commissions or joint boards under the provisions of the bill. It is thus apparent that the purpose of the bill is to apply federal law, not state law, to interstate motor-vehicle transportation, and that the state commissions consenting to act under its provisions would be administrative agents of the federal government.

Is this an unconstitutional delegation of federal power? The precise question has not been decided by the United States Supreme Court because no such bill has yet been passed. Attention, however, may be called to two carefully considered expressions of opinion to the effect that such use of state commissions to administer federal law is constitutional. One of these is by Judge Anderson and is found in his address, "State Commissions as Regional Federal Commissions", to which previous reference has been made.[1] The other is by Mr. Alfred P. Thom, General Counsel, Association of Railway Executives, and is contained in his testimony at the Interstate Commerce Commission motor-transport investigation at Washington, D. C., on October 27, 1926.[2] The argument for the validity of this plan of regulation will be briefly outlined. Congress may not delegate its power to make laws, but it may make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.[3] It is impracticable for Congress itself to prescribe detailed regulations which will be adaptable to all the varied facts and circumstances that arise in the administration of federal law. It may accordingly confer administrative functions upon an agent acting under the provisions of federal law to fill in the details of regulation.[4] This is what Congress has

[1] See pp. 386-387, *supra*.

[2] A transcript of this testimony appears in *Railway Age, Motor Transport Section*, Nov. 27, 1926, pp. 1072-1076.

[3] *Union Bridge Co.* v. *United States* (1907), 204 U. S. 364, 383.

[4] *United States* v. *Grimaud* (1911), 220 U. S. 506.

done in authorizing the Interstate Commerce Commission to regulate the charges, service and other details of management of interstate carriers. The delegation of congressional power involved in proposed legislation, such as the Denison bill, would, therefore, clearly be constitutional if the agents to administer its provisions were federal appointees. But there is no hard-and-fast rule that federal agents must be appointed by federal authority. The Court sustained the provisions of Section 5 of the Safety Appliance Act of 1893 [1] authorizing the American Railway Association to designate the standard height of draw bars for freight cars.[2] The United States, where not prohibited by a state, may use state courts, judges, and other officials in the enforcement of federal law.[3] State officers have been permitted to participate in the enforcement of federal laws relating to the return of fugitive slaves, compulsory military service in both the Civil and World Wars, eminent domain proceedings, the naturalization of aliens, and the liability of employers for death or injury to their employees. A convincing argument is, therefore, made that no illegal delegation of federal power is involved in the use of state appointees to perform administrative functions in the regulation of interstate commerce.

We now turn to the third class of proposals which contemplate the removal of restraints upon state power by limiting the scope of federal regulation. For some years past the National Association of Railroad and Utilities Commissioners has adopted at its annual conventions a series of resolutions proposing the amendment of the Interstate Commerce Act to curb federal interference with the exercise of

[1] 27 Stat. L. 531.

[2] *St. Louis, I. M. & S. Ry.* v. *Taylor* (1908), 210 U. S. 281.

[3] See *Second Employers' Liability Cases* (1912), 223 U. S. 1, 55-58; Hall, *Cases on Constitutional Law* (1913), p. 953, n. 2 and cases there cited.

state powers. The amendments proposed in these resolutions relate to a variety of subjects, including intrastate rates, state power to order additions and betterments, car service, certificates of convenience and necessity, and the rates and service of electric street railways. Various bills have been introduced at recent sessions of Congress which, if enacted, would carry into effect some of the Association's recommendations.

The most important of these proposals is intended to diminish the exercise of federal power to regulate the charges for intrastate transportation. The position of the National Association of Railroad and Utilities Commissioners is stated in resolutions repeatedly adopted by it which read as follows:

Resolved: That we urge upon Congress immediate legislation which shall so amend the Interstate Commerce Act as clearly to define and limit the power of the Interstate Commerce Commission so that no intrastate rate may be changed or set aside without proof by competent evidence and upon findings of fact made, that the same injures a person or persons or a locality or localities engaged in interstate commerce to such an extent as seriously to diminish the business of such person or persons, or seriously to retard the growth and development of such locality or localities; and that no intrastate rate may be changed or set aside by the Interstate Commerce Commission except upon formal complaint by such person or persons, or by such locality or localities.

Resolved: That it is the sense of this Association that the group plan of making rates, prescribed by said Section 15a is uneconomic and unsound and that the attempt, under its provisions, to produce returns upon roads that are unable to earn returns themselves, has placed an unjust burden upon the business of the nation, from which it should be relieved by the immediate repeal of said Section 15a.[1]

[1] National Association of Railroad and Utilities Commissioners, *Proceedings*, 1925, p. 385.

If the recommendations of these resolutions were carried into effect, the power of the Interstate Commerce Commission to regulate the general level of intrastate rates would disappear because changes in the general level of rates throughout a state are ordinarily not necessary to protect particular persons or localities from discrimination, but are ordered for the purpose of executing the general rate-making policy prescribed by Section 15a. A bill introduced by Senator Pittman [1] is along the lines of the first resolution above quoted, but does not go quite so far as the Association's recommendation. Senator Pittman's bill distinguishes, as does the Association's resolution, between discriminations against particular persons or localities engaged in interstate commerce and discrimination against interstate commerce as a whole. Concerning the former class of discrimination, both Senator Pittman and the Association recognize the necessity for the continued existence of federal power to protect persons or localities engaged in interstate commerce from discrimination arising from intrastate rates. The bill, however, would limit the exercise of this power by the following proviso:

> Provided, That no rate, fare, charge, or classification or any regulation or practice with respect to rates, in intrastate commerce, made or imposed by authority of any State, shall be changed or set aside unless the same shall be found, from competent evidence, to injure a person or persons, or a locality or localities, engaged in interstate commerce, *to such an extent as seriously to diminish the business of such person or persons, or seriously to retard the growth and development of such locality or localities, and unless the same shall also be found, from competent evidence, to be unreasonable under the traffic and transportation conditions existing in such State, and under honest, efficient, and economical management and operation.*[2]

[1] S. 758, introduced December 8, 1925.

[2] Italics mine.

The restriction upon federal power resulting from the italicized words is not contained in the Act as it now stands. An obvious implication from these words is that in cases where the intrastate rates in question are reasonably high, aside from the question of discrimination, the discrimination must be removed, not by increasing intrastate rates, but by reducing interstate rates. With reference to federal power to remove discrimination against interstate commerce as a whole by ordering an increase in the general level of intrastate rates, the Association's recommendations would destroy this power entirely. But the Pittman bill also contains provisions relating to this power of the Interstate Commerce Commission which would destroy it only when some regulatory or administrative body of the state has authority to adjust the intrastate rate structure from time to time as warranted by existing conditions. In other words, the Pittman bill would still leave full power in the Interstate Commerce Commission in executing its rate-making policy pursuant to the provisions of Section 15a, which would not be repealed by the bill, to order the increase of intrastate rates fixed by state statutes. The justification for this distinction lies in the fact that it is much easier to obtain a state commission order to increase rates as required by existing conditions than to persuade a state legislature to amend statutes by which rates are fixed. While the Pittman bill neither repeals nor amends Section 15a of the Interstate Commerce Act, it makes it impossible for federal authority to apply the rate-making policy prescribed by that section to intrastate rates in states having commissions clothed with the ordinary regulatory powers.

The position of the state authorities as set forth in these resolutions adopted by state commissioners and in the Pittman bill, is in substance that the authority of state commissions over intrastate rates should be restored to the extent

that it existed prior to the Transportation Act of 1920, subject, however, to federal power to remove substantial discriminations against particular persons or localities engaged in interstate commerce in accordance with the principles of the Shreveport decisions. The arguments for and against this position will be discussed under three headings—political, economic and administrative.

The political argument advanced by the states has for its basis the doctrine of "states' rights", with which we are familiar in many forms. The federal government is a government of limited jurisdiction, possessing only those powers specifically granted to it by the people of the United States, and all powers not so granted are reserved to the states. These reserved powers have been held to include the police power to regulate local affairs so as to protect the health, morals and general welfare of the inhabitants of each state. Therefore, the state commissioners say the federal government is guilty of gross usurpation of state power when it dictates the fares and rates the New York Central Railroad shall charge between Syracuse and Utica—to choose a situation as unrelated to interstate commerce as can possibly be found on an interstate railroad.

Two criticisms should be considered with respect to the states' rights argument. First, does it not beg the question by presupposing that rates between Syracuse and Utica are purely matters of local concern? It seems to be rather badly shaken if it can be shown that the nation as a whole is concerned with such rates. In other words, is there a relevant political argument? When the question of states' rights is raised we seem to be driven at once into the realm of economics to determine whether vital national interests are not involved in such a problem. The second criticism is that the argument is inconsistent with the acceptance of the principle of the Shreveport decision. In accepting that principle

the states concede the right of the federal government to regulate, for example, commutation fares from Yonkers to New York City, if they believe that such fares result in unjust discrimination against interstate commuters from New Jersey, but at the same time the states deny that possible injury to interstate shippers using the New York Central, which might arise if its earning capacity became unduly low, can give to federal authorities any right to say what should be charged for transportation between Syracuse and Utica.

The basis of the economic argument stressed on the federal side of the controversy is the fact that about one quarter of the gross revenue of railroads engaged in interstate commerce is derived from traffic which does not cross state lines, and that the same facilities, such as tracks, yards, stations, locomotives and cars, must be used for both intrastate and interstate traffic. The physical separation of the two kinds of transportation is impracticable; it is only through the combined use of the same facilities that either class of traffic can be transported without enormous economic waste. This means that the return on capital invested in such facilities must be derived from both intrastate and interstate revenues. Whether there is single or multiple regulation of the charges of an interstate carrier, there is but a single final result of operations, the net railway operating income. This, in the language of theory, is a function of many variables, such as labor costs, material costs, taxes, interstate rates and intrastate rates. The composite function, the net railway operating income, must be sufficient to attract new capital required to expand the national transportation system to meet the growing national demand for transportation. Such expansion of facilities is clearly a matter of national concern. Therefore, it is argued, it is not only appropriate but necessary that the federal govern-

ment should have and exercise the power to override state authority when, in the judgment of the Interstate Commerce Commission, intrastate traffic is not paying its fair share of the total transportation costs, including a fair return on the value of property used in transportation service. Unless this is done, either one of two results must follow; the needed expansion of facilities must cease because the net operating income has fallen below the level necessary to attract new capital, or interstate rates must be raised so as to yield revenue in excess of their fair share of transportation costs. Either of these results places an unjust burden on interstate commerce, which it is the duty of the federal government to avert.

But the states reply to this economic argument: We think the present basis of federal rate regulation is economically unsound and imposes an unreasonable burden on the commerce of the states. We do not accept the underlying principle of Section 15a which seeks to establish a general rate level, applicable to both prosperous and weak carriers, which will yield a fair return on the aggregate value of the property of all railroads in a given rate group. This principle attempts to make transportation revenues in the aggregate equal to the cost of service by all carriers in a group including a fair return on the value of their properties. We contend that the cost of service by the weaker roads is not a correct basis of rate regulation where it exceeds the economic value of their services as measured by the rates at which similar traffic is profitably transported by their stronger competitors. Many of the weaker lines in each rate-making group do not and can not render transportation of sufficient value to produce what is called a fair return on the value of their property as computed by any of the commonly accepted methods of valuation. Yet the rate-making policy prescribed by Section 15a seeks to include such a re-

turn in the aggregate freight bill of the nation. Moreover, Section 15a does not attempt to give these weaker lines such a return, but does attempt to collect an amount equivalent thereto from shippers using other lines for both interstate and intrastate traffic. We, therefore, find that our residents shipping freight wholly within a single state and using the stronger lines of a rate group are compelled by a federal plan of rate-making to pay rates in excess of the amount necessary to yield a fair return to the railroads they patronize, for which excess no other shippers receive equivalent service.

To illustrate, suppose a rate group consists of only two roads, A and B, each with property valued at $100,000,000. The Commission, having decided that 5¾% constitutes a fair rate of return, in accordance with Section 15a fixes general rate levels for the group so that the aggregate net operating income of both roads is $11,500,000. But owing to its more favorable geographic situation, road A gets $7,500,000 of this net income and road B only $4,000,000. Thus the patrons of road A are paying $1,750,000 per annum in excess of the amount needed to yield a fair return to that road. Under the recapture provisions of the Transportation Act of 1920, none of this $1,750,000 is added to the net operating income of road B, although some of it is subject to recapture and is placed in a fund to be used for loans to railroads, or for the purchase of equipment to be leased to railroads. According to the state view, the provisions of Section 15a unjustly exact from the patrons of the stronger roads a sum in excess of the reasonable cost of the transportation services rendered to them, even when such cost is figured to include a fair return on the value of the property used in such service. This excess, the states argue, cannot be justified by the financial position of the weaker roads, not only because it is not actually added to their in-

come, but also because no service of equivalent value is rendered by these weaker roads. The states thus desire a redistribution of power which will enable them to protect intrastate shippers from the economic consequence of applying the policy of Section 15a to intrastate rates.

In addition to the objections to the principle of this rule of rate-making, another reason contributed to the determined opposition by state authorities to federal regulation of the general level of intrastate rates. There was a widespread feeling on the part of state commissioners that the tentative valuations used by the Interstate Commerce Commission in 1920 were unduly liberal to the railroads in fixing the value of their property to be used for rate-making purposes and that the final valuations would be correspondingly high. Some of these critics then feared that the Commission would exceed the "original prudent investment" basis which they advocated, and in other respects would fail to conform with the views of the stricter authorities on this highly controversial problem of valuation. At the present time the valuation work of the Commission is under fire from the opposite direction and is criticized as conforming too closely to "original prudent investment" without giving sufficient weight to the present cost of reproducing the properties. It now seems that the advocates of low valuations did not correctly forecast the attitude of the Commission, and that there was little basis for their fear that it would attempt to regulate the general level of intrastate rates in such a way as to extort from intrastate shippers a return on non-existent property values. Nevertheless we still find critics of the Commission's methods who contend that its valuations are too high.[1] The fear that federal regulation

[1] The Minnesota Railroad and Warehouse Commission has recently stated that the Interstate Commerce Commission has over-valued a group of roads operating in Minnesota by $40,000,000. See New York *Evening Post*, April 5, 1927.

of intrastate rates will be based on excessive values has made many state authorities eager to regain the power to relieve intrastate traffic from a burden which to them appears to be so unjust. The United States Supreme Court has not yet passed upon the valuation method of the Commission and may find that the use of values substantially less than the present cost of reproduction, as a basis for rate-making or recapture of excess earnings, constitutes a taking of property without due process of law. In that event, the Commission would be compelled to value the properties more nearly in accordance with the present cost of reproduction, which as a basis of valuation is exceedingly offensive to the advocates of " original prudent investment ". They would, however, gain little by a transfer of the power to regulate the general level of intrastates rates from the nation to the states, so far as the values used for rate-making are concerned, because the same principles which would prevent the use of low values by the federal government would also prevent their use by the states.

Regardless of one's individual opinions concerning the principle of rate-making set forth in Section 15a, or the valuation being made by the Interstate Commerce Commission, it must be recognized that both are subjects upon which the views of reasonable men can and do vary widely. Views will necessarily differ as to whether a given impediment to interstate commerce is economically justifiable, but there must be a master entrusted with the responsibility of decision, and our entire scheme of government imposes this responsibility upon Congress and not upon the several states, subject to the constitutional prohibitions against the taking of property without due process of law. The economic argument for federal control of intrastate rates, therefore, seems complete when it is shown that a decrease in such rates will in some measure impede interstate commerce and

our agreement or disagreement with the federal rate-making policy is aside from the point.

The administrative argument for restoration of state power over intrastate rates is based upon the contentions that the problems arising therefrom are too numerous for any one commission to hear and determine, and that it is impossible for a centrally located commission to obtain the knowledge of local conditions necessary for intelligent determination of many of the questions raised. Both of these contentions seem sound. It is, therefore, impracticable to deprive the state commissions of all regulatory power over the intrastate rates of interstate carriers. The exercise of power by them is, however, not inconsistent with the exercise of the paramount authority of the federal government where the issue affects interstate commerce. This suggests that it may be wise to apply the principles of Judge Anderson's plan and the Denison bill, which would place the state commissions in substantially the same relation to the Interstate Commerce Commission as that of courts of original jurisdiction to appellate courts. In all matters relating to intrastate rates the position of the state commission could be made similar to that of courts of original jurisdiction, that is, all complaints could be made to them in the first instance. If the issue involves merely local adjustments between commodities or localities within the state, without substantial effect on the net income of interstate carriers, the state decision should be final. If, however, the issue involves interstate questions, the state commission could render and enforce its decisions, just as inferior courts do, consistently with general principles laid down by appellate authority, and subject to appeal to this higher authority, in this case the Interstate Commerce Commission. Probably in the majority of cases, even though the right of appeal exists, the defeated party would abide by the decision of the

state commission unless it departed radically from the federal policy as pronounced by federal authority. Such procedure, however, would not satisfy those who advocate restrictions of federal power to regulate intrastate rates because they dislike the necessity of conforming state regulations to general principles laid down by Congress and the Interstate Commerce Commission which they are unwilling to accept.

Another recommendation made by the National Association of Railroad and Utilities Commissioners is that Congress be urged to amend the existing law in such manner and form as to restore to the several states all the rights, powers and authority enjoyed by them relative to certificates of convenience and necessity prior to the enactment of the Transportation Act of 1920.[1] This means that the state commissioners desire to have the power to compel an interstate railroad to extend its lines within a state for the purpose of rendering intrastate service and to prohibit the abandonment of intrastate service on any such lines. Bills have been introduced in Congress to accomplish this result. One of these bills,[2] introduced by Senator Mayfield of Texas, was passed by the Senate on April 22, 1926, but was not passed by the House. Under the provisions of this bill federal certificates of necessity and convenience would be required for the construction of an entirely new line of railroad by a carrier engaged in interstate commerce, but would not be required for extensions of existing lines. The bill provides that in the case of abandonments a federal certificate of necessity and convenience authorizing the abandonment shall not operate to relieve the carrier from also procuring such authority for the abandonment of a line

[1] National Association of Railroad and Utilities Commissioners, *Proceedings*, 1925, p. 386.

[2] S. 750.

located wholly within one state as may be required by the laws of that state. Senator Mayfield's bill would thus restore to the states their former power with respect to the regulation of the extension or abandonment of railroads for purposes of intrastate commerce. Senator Pittman of Nevada introduced a bill [1] which would permit all railroads engaged in interstate commerce to construct extensions of their lines or new lines without obtaining certificates from the Interstate Commerce Commission. Representative Jones of Texas also introduced a bill [2] which would dispense with federal certificates in cases in which a state commission certifies to the Interstate Commerce Commission that the present or future public convenience and necessity require or will require an extension of a line of railroad or the construction of a new line, wholly within the state. The difference between the Pittman bill and the Jones bill is that the former would entirely remove the requirement of a federal certificate for the construction of new lines or of extensions of existing lines, irrespective of whether the construction would cross a state line, while the latter would remove the requirement only with respect to construction wholly within a state, certified by state authority to be required by public convenience and necessity. But either of these bills would restore state power to compel an interstate railroad to extend its lines within a state for purposes of intrastate transportation. Neither the Pittman bill nor the Jones bill contains any provision to restore state power to prevent the abandonment of any part of an interstate railroad.

Another resolution of the National Association of Railroad and Utilities Commissioners urges such amendment of the Interstate Commerce Act as shall remove all question as

[1] S. 759, introduced December 8, 1925.

[2] H. R. 13493, introduced December 6, 1926.

to the continued power of state authorities to require common carriers to make additions and betterments to their plants and facilities reasonably necessary for the safe and proper service of the public.[1] The two chief obstacles to such exercise of state power are the present provisions of the Act requiring federal certificates of necessity and convenience covering construction and extension, and federal approval of the issue of securities. The Association's recommendation, broadly interpreted, would appear to require, not only the amendment of the provisions concerning certificates of necessity and convenience, but also the amendment of the provisions concerning the issue of securities so as to dispense with the necessity of federal approval in cases where it is necessary to issue securities to obtain funds to comply with state requirements.

These proposals to remove restraints upon state power to require construction, extensions, additions and betterments, and to compel the continued operation of existing lines are supported by the same political and administrative arguments which have been considered in connection with the proposals for the restoration of state power to regulate charges for intrastate transportation. From the economic standpoint they seem to be inconsistent with the policy of imposing upon the Interstate Commerce Commission the duty and responsibility of protecting the financial stability of our national transportation system, with adequate power to accomplish this result. Whenever a state compels a railroad to make capital expenditures which fail to earn the interest charges on the capital invested therein, or to continue particular operations at a loss, one of two results must follow. The credit and financial capacity of the railroad to render adequate transportation service must suffer, or the financial

[1] National Association of Railroad and Utilities Commissioners, *Proceedings*, 1925, p. 385.

burden of meeting the deficit must be transferred to the general public by increasing the charges for transportation or by taxation. It is often possible for a state to prevent its requirements from becoming a burden upon interstate commerce by authorizing an increase of intrastate charges or by imposing a part of the expense upon the taxpayers as is customary in grade-crossing elimination. But there is no assurance that the states will provide compensation for the financial burdens imposed by their requirements, nor would it always be possible to do so, as neither taxes nor charges for transportation can be increased indefinitely without reaching a point where the revenue yield is diminished by raising the rates. It is, therefore, practically certain that the Interstate Commerce Commission, in the discharge of its duty of protecting the financial stability of the national transportation system, would confront state requirements involving expenditures which would have to be met from the general fund which supports the service of interstate transportation. If the Commission should be deprived of all power to veto such requirements, it would be helpless to protect this general fund from impairment except through the expedient of increasing the general level of charges for transportation. This expedient, however, is not available if the traffic will not bear higher rates and even when it might be possible to increase revenue by raising rates, the resulting burden upon the shipping and travelling public might in the judgment of the Commission be unreasonable. For these reasons it is possible to make a very strong argument against the impairment of the Commission's powers to control the capital expenditures of interstate railroads and to authorize them to discontinue unprofitable operations even when the expenditures or operations are to be made or conducted solely for the service of intrastate traffic.

The Association has also recommended that the Inter-

state Commerce Act be amended in such way that the regulatory authorities of the states may make reasonable orders and regulations, not in conflict with federal law or with lawful orders of the Interstate Commerce Commission, requiring cars within the respective borders of such states to be equitably distributed to shippers desiring them, without regard to whether they are desired for use in shipments that are interstate or intrastate.[1] This recommendation is much milder in its effect upon the distribution of powers than the other proposals which have just been considered. It does not contemplate any impairment of existing federal powers and merely seeks to reestablish the concurrent power of the states to regulate car service subject to the paramount power of Congress. A persuasive administrative argument can be made in favor of this suggestion, which can best be summarized by quoting from the preamble to the Association's resolution:

> It is impracticable for the Interstate Commerce Commission to attempt to supervise the distribution of cars as between individual shippers throughout the United States, and there should be some governmental authority within reasonable reach to which appeal can be made to require equitable distribution of cars without regard to whether the same are to be used for shipments, interstate or intrastate.

Nor does there appear to be any valid political or economic argument against the recommendation, since it does not attempt to attack the Interstate Commerce Commission's power to regulate car distribution whenever in its judgment the needs of interstate commerce require such action. It is true that the United States Supreme Court has decided that the states cannot impose penalties for failure to give inter-

[1] National Association of Railroad and Utilities Commissioners, *Proceedings*, 1925, p. 386.

state shippers their fair share of the available car supply.[1] These decisions, however, are not based upon the effect of the Constitution itself, but upon the Court's interpretation of the provisions of the Interstate Commerce Act by which Congress assumes general jurisdiction of the subject of interstate transportation service. From these provisions the Court has reached the conclusion that Congress intended that this subject should be unregulated except as prescribed by federal law. Therefore, if Congress by amendatory legislation should clearly indicate a contrary intention, it is probable that state power to regulate car distribution for all purposes, in ways not inconsistent with federal laws or orders, would be sustained.

In the closing days of the last session of Congress, Senator Mayfield of Texas introduced a resolution for the amendment of the commerce clause of the Constitution by adding to it a proviso which reads as follows:

> Provided, however, That such power to regulate commerce shall not extend to the transportation of passengers or goods wholly within a State, such transportation beginning and ending within such State; and no regulation, classification, tariff, schedule, rate, fare, or charge prescribed by State authority for the transportation of passengers or goods wholly within a State, such transportation beginning and ending within such State shall be set aside, either in whole or in part, on account of its relation to, or effect upon, interstate or foreign commerce, or on account of its relation to or effect upon any regulation, classification, tariff, schedule, rate, fare, or charge applicable to interstate or foreign commerce.[2]

It is hardly too much to say that such an amendment would completely revolutionize our present dual system of regu-

[1] *Chicago, R. I. & P. Ry.* v. *Hardwick Farmers Elevator Co.* (1913), 226 U. S. 426; *Missouri Pacific R. R.* v. *Stroud* (1925), 267 U. S. 404.

[2] S. J. Res. 172, March 1, 1927.

lating interstate carriers. The proposals for amendments to the Interstate Commerce Act, which have been outlined in this chapter, would automatically become effective because the federal legislation which they seek to repeal or amend would be unconstitutional in so far as it applied to transportation wholly within a state. The constitutional amendment would go much farther than is contemplated by these proposals and would invalidate much federal legislation which is not under attack at the present time. It would destroy federal power to regulate transactions of intrastate commerce in ways which are conceded to be necessary and proper for the execution of the power to regulate interstate commerce. The principle of the Shreveport decision could not longer be applied to sustain federal orders protecting the interstate commerce of particular persons or localities from discrimination resulting from the low level of intrastate rates. The only relief that the federal authorities could possibly give them would be to reduce the interstate rates regardless of their reasonableness and the effect of such reduction upon the revenues of interstate commerce. Federal power to promote safety on interstate railroads would be crippled. The federal Safety Appliance Laws and the Boiler Inspection Laws could be applied only to motive power and rolling stock used in interstate transportation. Intrastate shipments of explosives or other dangerous commodities could not be regulated. Thus the federal government would be powerless to protect interstate travelers from the dangers arising from the use of defective equipment on intrastate trains or the intrastate transportation of dangerous commodities on the same railroad.

A redistribution of power by constitutional amendment differs radically from the amendment of federal statutes to remove obstacles which they have interposed to the exercise of state powers, although the immediate practical effect may

be the same. When the statutes only are amended, there is implicit recognition that the matter is one of legislative discretion and that with a change of economic conditions or other pertinent considerations a further readjustment could be made. The proposals for the amendment of statutes contemplate a legislative determination by Congress that federal regulation of intrastate rates, construction, extension, and operation, is not requisite for the proper execution of the power to regulate interstate commerce. Such a determination, which is made in view of all the attendant facts and circumstances, may be changed when these facts and circumstances change. To remove obstacles to the exercise of state power by amendment of federal statutes leaves the door open for a future exercise of federal power over intrastate transactions when it is necessary and proper for the effective federal regulation of interstate commerce. To effect the same result by a redistribution of power by constitutional amendment closes this door and leaves interstate commerce at the mercy of the states, which is just the situation that the framers of the Constitution sought to prevent by inserting the commerce clause and the supplementary "necessary and proper" clause.

The conflict between the state and the national demands for power to control interstate carriers is essentially a conflict between two principles, the principle that matters of national concern should be regulated by the federal government free from state interference, and the principle that matters of local concern should be regulated by the states free from federal interference. Both of these principles, abstractly stated, are generally accepted. The difficulties lie in their concrete application. In our complex civilization national and local interests have become inextricably commingled. We, therefore, need a third principle to apply to the vast majority of subjects of regulation which involve

both the interests of the nation and the states. It is very difficult to state a principle applicable to this situation, but an attempt to do so can be made somewhat as follows: In matters where national interests predominate the rule of regulation should be prescribed by the federal government, and in matters where local interests predominate the rule of regulation should be prescribed by the states. I believe that, in general, both the United States Supreme Court and Congress have endeavored to conform to such a principle. Its application necessarily involves the determination whether national or state interests are predominant in any given situation. It would be exceedingly confusing to give to the courts and legislatures of forty-eight different states final authority to make this determination. The power to decide this question should rest with some branch of the federal government, either Congress or the Supreme Court according to whether the determination is regarded as a matter of legislative discretion or judicial interpretation of constitutional powers.

In the regulation of interstate transportation the question of the predominance of state or national interests is usually one of economic fact, whether it arises in Congress or in the Court. It is here that the economist must play his part. If Congress is considering the expediency of extending or restricting the exercise of its power to regulate interstate carriers, it should obtain from experts in the economics of transportation an analysis of the facts showing the extent to which national interests need protection by federal regulation and the extent to which the exercise of federal power is likely to interfere with the protection of local interests by state regulation adapted to local conditions. If the Supreme Court is called upon to decide whether a state law or order is an unconstitutional regulation of interstate commerce, it should be given a careful economic study of the local neces-

sity calling for state regulation, and the extent to which that regulation impedes or burdens interstate commerce. The Court uses various formulæ in sustaining or denying state power in such cases. A state law or order may be declared valid because it does not regulate interstate commerce but merely incidentally affects that subject, or because the particular subject permits diversity of regulation by the states. On the other hand, it may be declared invalid because it is a regulation of a subject demanding a uniform, national rule to be prescribed only by Congress, or because it imposes a burden on interstate commerce. But regardless of the formula used, the Court frequently reaches its decision by a process of balancing the local need for state action against the interference with interstate commerce resulting therefrom, a process which cannot be performed intelligently without an accurate and detailed knowledge of economic facts.

The tendency of congressional action, sustained by Court decisions, has been to transfer from the states to the nation a large measure of control over interstate carriers. The process reached its climax in the comprehensive exercise of federal power, pursuant to the provisions of the Transportation Act of 1920, and the resulting impairment of state authority. Symptoms of a reaction are now apparent. The present demand is not for further expansion of federal regulation, but for the removal of restraints upon the exercise by the states of much of the power which they exercised prior to 1920. The 69th Congress adjourned *sine die* on March 4, 1927, without giving legislative expression to this demand and the extreme concentration of control in the hands of federal authorities still prevails. Further limitation of state power in the immediate future is highly improbable. The pressing problem will be to determine to what extent, if any, it is advisable to decentralize the control

of interstate carriers in favor of the states. In facing this problem there are two fundamental considerations: the need for relieving the Interstate Commerce Commission of much of its present burden with a view to promoting the prompt and efficient regulation of matters of local concern as required by local conditions, and the need for protecting our national transportation system from the uncertainty and confusion of diverse and conflicting policies of regulation. Is it possible to reconcile these two apparently conflicting requirements? The answer has been suggested by Judge Anderson, Senator Pittman and Representative Denison in their proposals for the use of state commissions as agencies for the execution of federal power. The need for an adequate and efficient national transportation system is so vital that we cannot afford to deprive it of the protection of a single, consistent plan of regulation. But the administration of such a plan permits of a multitude of local adjustments to meet local needs. There is an imperative duty to provide efficient administrative machinery for this purpose, subject, however, to the control of a central authority vested with comprehensive power to conform local regulation to national necessity.

The conflict between the demand for a uniform federal policy and the demand for state autonomy to control what are regarded as matters of purely local concern has arisen or may well arise in connection with the solution of many other problems with which we are now confronted. As between the states and the nation, how should we distribute the power to enforce prohibition, to make laws concerning marriage and divorce, to regulate industrial conditions, such as the employment of child labor, to construct highways, to control the use of natural resources, such as water power, timber, minerals and oil, to provide protection against floods, to regulate the transmission and sale of electric power, and

to tax property, income and inheritance? It is not within the scope of this volume to attempt to answer this question. But a method of approach may be suggested by the study of the regulation of interstate carriers. In this regulation we find an established principle that, in matters requiring a uniform nation-wide plan of regulation, the federal government has exclusive power to establish such a plan. To the extent that uniformity of regulation is necessary in other fields of governmental activity, we may find it imperative to attempt the solution of the problem by a similar exercise of exclusive federal power. In some cases this would require constitutional amendment to clothe the Congress with powers which are now lacking. On the other hand, when the situation is one which does not require uniformity of regulation, but permits of adjustment to meet varying local conditions, should we not endeavor to preserve the fullest measure of state power? We have seen from the regulation of interstate carriers, that the existence of a very considerable amount of state autonomy is not incompatible with the recognition of exclusive federal power with respect to other aspects of the same general subject requiring a uniform policy.

In the regulation of interstate carriers economic facts have played a very large part in determining whether a uniform nation-wide plan of regulation is necessary. Thus the exercise of federal power to regulate the general level of intrastate rates is sustained because of the economic relation between the intrastate rate structure and the efficiency of interstate transportation service. The same economic test seems applicable in many other fields of legislation. For example, the question of whether a uniform federal plan of inheritance taxation is necessary may resolve itself into a balancing of the economic needs of the states for revenue from this source against the economic burden imposed upon the nation by the confusion of a multiplicity of state inheritance tax

laws and by the resulting restraint upon the free flow of capital from state to state.

Our experience with interstate carriers indicates that whenever the demands for federal and state power conflict, we should seek to determine whether national or state interests predominate. Such determination requires a careful study and interpretation of economic facts. When national interests are predominant, they should be guarded against the evils of multiple regulation by the establishment and enforcement of a uniform federal policy. The federal legislation, however, should permit such local adjustments to meet local needs as can be made without injury to paramount national interests. When state interests are predominant, the evils of extreme centralization of power should be avoided by the preservation of state autonomy.

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